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# A TREATISE

ON THE

# LAW OF EVIDENCE.

BY

SIMON GREENLEAF, LL.D.,
EMERITUS PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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Quorsum enim sacræ leges inventæ et sancitæ fuere, nisi ut ex ipsarum justitia unicuique jus suum tribuatur? — MUSCARDUS EX ULPIAN.

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VOLUME III.

EIGHTH EDITION, CAREFULLY REVISED, WITH LARGE ADDITIONS,

BY

ISAAC F. REDFIELD, LL.D.

BOSTON:
LITTLE, BROWN, AND COMPANY.
MDCCCLXVIII.

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1857
vol.3

Entered according to Act of Congress, in the year 1860,
by James Greenleaf,
in the Clerk's Office of the District Court of the District of Massachusetts.

Entered according to Act of Congress, in the year 1867,
by Mrs. James Greenleaf,
in the Clerk's Office of the District Court of the District of Massachusetts.

University Press: Welch, Bigelow, & Co.,
Cambridge.

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## ADVERTISEMENT TO THE SECOND EDITION.

In the present edition, this volume has been revised and corrected, as far as the short period which has elapsed since the publication of the first would permit, with the endeavor of the author to make it more deserving of the favor with which it has been received. The Laws of the United States are cited from the edition of Mr. Peters, continued by Mr. Minot, and published by Messrs. Little, Brown, & Co., this being now mostly in use, and incomparably the best which has been published.

Cambridge, Mass., October, 1853.

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# PART V.

OF

# EVIDENCE IN PROSECUTIONS

FOR

# CRIMES AT COMMON LAW.

## GENERAL PRINCIPLES.

A

# TREATISE

ON

# THE LAW OF EVIDENCE.

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## PART V.

### OF EVIDENCE IN PROSECUTIONS FOR CRIMES AT COMMON LAW.

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### GENERAL PRINCIPLES.

[* § 1. Crimes classified and defined.

2. The attempt to commit a crime a misdemeanor.

3. Infants, persons *non compotes mentis*, and those deficient in will, incapable of crime.

4. Infancy divided into three stages.

5. Sanity presumed until contrary appears.

6. Criminal acts the immediate result of intoxication punishable.

7. *Femes covert*, principal class of persons acting under constraint of superior power.

8. Effect of *duress per minas* considered.

9. Effect of commission of criminal act by innocent agents.

9 *a*. Corporations indictable.

10. Constitution of the United States declares the accused has a right "to be informed of the nature and cause of the accusation."

11. The party accused is entitled, as of common right, to be confronted with the witnesses against him.

12. Answer to criminal prosecution at common law is "*not guilty*."

13. Intention of an act constitutes its criminality.

14. Rule, that every person is presumed to contemplate the ordinary and natural consequences of his own acts, applied even in capital cases.

15. Evidence of acts and declarations *at other times* admitted to prove intent of act charged.

16. Where several intents comprised in one allegation, proof of any one which would constitute the crime sufficient.

17. Intent must be proved as alleged.

18. Not necessary, in proving an intent to defraud a particular person, to show that prisoner had that person in mind.

19. *Corpus delicti* must be proved before criminal intent.

§ 20. Mistake or ignorance of the law no excuse.
21. Mistake or ignorance of fact sometimes excuses.
22. Names of persons injured must be proved, as charged.
23. Substance of the issue must be proved.
24. Burden of proof same as in civil cases.
25. Evidence of character, when admitted, should be confined to the trait of character in issue.
26. Evidence of character not admissible in all prosecutions.
27. Character of person on whom offence was committed generally not admissible.
28. Criminal charge must be proved by our own rules of evidence.
29. Guilt of the accused must be fully proved.
30. *Corpus delicti*, and *identity of prisoner*, must be proved.
31. This rule more frequently and urgently demanded in prosecutions for homicide and larceny.
32. *Recent* possession only justifies the inference of guilt.
33. Prisoner's possession must be exclusive.
34. Presumption from *suppression, fabrication*, or *destruction of evidence*, not conclusive.
35. United States constitution provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb."
36. Prisoner must prove the identity of the offence in his defence. Charges need not be precisely alike in form.
37. This provision differently interpreted.
38. Acquittal or conviction procured by fraud of prisoner not good defence.
39. Admissions of fact not permitted unless made in open court.]

§ 1. A *crime is defined* to be an act, committed or omitted, in violation of a public law, either forbidding or commanding it.[1] In the common law, crimes are divided into three classes: treasons, felonies, and misdemeanors. All public wrongs below the degree of felony are classed as misdemeanors, and may be the subject of indictment, either at common law or by statute. Misdemeanors, again, are divided into two classes: *mala in se*, and *mala prohibita*. In the former class is comprised whatever mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official public duty, when done wilfully or corruptly. The latter comprises the doing any matter of public grievance forbidden by statute, or omitting any matter of public convenience commanded by statute, but not otherwise wrong; whether it be or be not expressly made indictable, or visited with any specific penalty, by the statute.[2]

[1] 4 Bl. Comm. 5. This definition comprises all crimes, whether existing and recognized as such at common law, or whether created wholly by statute. A crime at common law may be defined as an act done with criminal intent, to the injury of the public. Rex *v.* Wheatly, 1 Leading Crim. Cases, 3, note.

[2] 1 Russ. on Crimes, 45, 46, (3d edit.); Rex *v.* Sainsbury, 4 T. R. 457; 2 Inst. 163.

§ 2. The *attempt to commit a crime*, though the crime be but a misdemeanor, is itself a misdemeanor. And to constitute such an attempt, there must be an intent that the crime should be committed by some one, and an act done pursuant to that intent.[1] *Quidquid criminis consummationi deest, conatum constituit.*[2] Thus, to incite another to steal, or to persuade a public officer to receive a bribe, are alike misdemeanors.[3] So, to possess instruments for coining false money, with intent to use them.[4] So, to send threatening letters;[5] to challenge another to fight, whether with fists or weapons;[6] to solicit another to commit adultery.[7]

§ 3. In regard to the *persons chargeable with crimes*, it is proper, in the first place, to consider the evidence of *criminal capacity*, or the degree of reason and understanding which is sufficient to render a person liable to the penal consequences of his actions. Persons deficient in this respect are of two classes: *infants*, and per-

[1] 1 Russ. on Crimes, 46; Rex *v.* Wheatly, 1 Leading Crim. Cases, 1, and note; Regina *v.* Meredith, 8 C. & P. 589; Rex. *v.* Higgins, 2 East, 5, 17–21; Rex *v.* Kinnersley, 1 Stra. 193, 196. In some of the United States, the attempt to commit a crime is punishable by statute. And see Commonwealth *v.* Harrington, 3 Pick. 26; Commonwealth *v.* McDonald, 5 Cushing, 365. [* An attempt to commit a felony can only be made out where, if no interruption had taken place, the felony could have been effected. And where a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. Reg. *v.* Collins, 10 Jur. (N. S.) 686. "I think attempting to commit a felony is clearly distinguishable from intending to commit it." Cockburn, C. J., in R. *v.* McPherson, Dears. & B. C. C. 197.]

[2] Evertsen De Jonge, De delictis cont. Rempub. Vol. 2, p. 217. But there must be an act done; for, Cogitationis pœnam nemo patitur. Dig. lib. 48, tit. 19, l. 18.

[3] Rex *v.* Higgins, 2 East, 5, 17–21; Rex *v.* Vaughan, 4 Burr. 2494.

[4] Rex *v.* Sutton, 2 Stra. 1074. Cases may, and probably do, differ, say the editors of Leading Crim. Cases, in a note to Rex *v.* Wheatly, Vol. 1, p. 6, as to what is a sufficient overt act to constitute the crime; but all decisions, ancient and modern, recognize the principle, that a criminal intent alone, unaccompanied by any overt act, is not punishable by the common law. We say cases may and do differ in their application of the principle, and may sometimes be in direct conflict with each other, upon the proper effect of some particular conduct. Thus, in Rex *v.* Sutton, 2 Stra. 1074, more fully reported in Cases temp. Hardwicke, 370, it was thought that having instruments for counterfeiting coin in one's possession, with intention to coin money and to pass it as genuine, was a sufficient act to be indictable, and the same is laid down as law in 3 Greenl. Ev. § 2. It may be that the decision in Strange was based upon Stats. 8 & 9 Will. 3, ch. 25, which is cited in 2 Wm. Blackstone, 807, and was not a decision at common law; but, whether it be so or not, the modern cases have established a different doctrine. But all agree that *procuring* counterfeit coin with such intent is an act indictable. Rex *v.* Fuller, Russell & Ryan, C. C. 308; Dugdale *v.* Regina, 16 Eng. Law and Eq. R. 380; 1 Pearce, C. C. 64; 1 Ellis & Bl. 435. [See also, Regina *v.* Roberts, 33 Eng. Law and Eq. R. 553.] [* The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. Pollock, C. B., Reg. *v.* Taylor, 1 F. & F. 5.]

[5] United States *v.* Ravara, 2 Dall. 297.

[6] Commonwealth *v.* Whitehead, 2 Law Reporter, 148; The State *v* Farrier, 1 Hawks, 487; Rex *v.* Phillips, 6 East, 464. An attempt to commit suicide is a misdemeanor at common law. Regina *v.* Doody, 6 Cox, C. C. 463.

[7] The State *v.* Avery, 7 Conn. 266.

sons *non compotes mentis*, or *insane*. To these may be added the class of persons deficient in *will*, that is, acting under the *constraint* of *superior force or the power of others*, and not of their own free will or accord; such as *femes covert*, acting in the presence or by coercion of their husbands, persons under duress *per minas*, and some others. For in such cases there is no liberty of the *will;* and without the consent of the will, there is, says Lord Hale, no just reason to incur the penalty or sanction of a law instituted for the punishment of crimes or offences.[1]

§ 4. With respect to *infants*, the period of infancy is divided by the law into three stages. The *first* is the period from the birth *until seven* years of age; during which an infant is *conclusively* presumed incapable of committing any crime whatever. The *second* is the period *from seven until fourteen*. During this period the presumption continues, but is no longer conclusive, and grows gradually weaker as the age advances towards fourteen. At any stage of this period the presumption of incapacity may be removed by evidence showing intelligence and malice; for *malitia supplet ætatem;* but the evidence of that malice which is to supply age, ought to be strong and clear beyond all reasonable doubt.[2] There are, however, some exceptions to the rule governing this period; for a female, under ten years of age, is conclusively presumed incapable of giving consent to an act of criminal sexual intercourse with herself; and a male under fourteen is conclusively presumed incapable of committing a rape.[3] The *third* commences *at fourteen;* the presumption of incapacity arising from youth being then entirely gone, and all persons of that age and upwards being presumed, in point of understanding, capable of committing any crime, until the contrary be proved. Thus, from seven to fourteen the burden of proof is on the accuser to show the capacity of the accused; after that period it is on the accused to show his incapacity.[4] But here,

[1] 1 Hale, P. C. 14, 15.

[2] 4 Bl. Comm. 22, 23. And see The State *v.* Guild, 5 Halst. 163; Rex *v.* Owen, 4 C. & P. 236. In these cases, the prosecutor must prove two points of fact: first, that the prisoner committed the act charged; and, secondly, that he had at that time a guilty knowledge that he was doing wrong. Ibid. Per Littledale, J.

[3] 4 Bl. Comm. 212; Regina *v.* Phillips, 8 C. & P. 736; Regina *v.* Jordan, 9 C. & P. 118; Regina *v.* Brimilow, 9 C. & P. 366; 2 Moody, C. C. 122. But it has been held, that he may be guilty of an assault with an intent to commit a rape; for the reason that an intent to do an act does not necessarily imply an ability to accomplish it. Commonwealth *v.* Green, 2 Pick. 380. See *contra*, Rex *v.* Eldershaw, 3 C. & P. 396; Regina *v.* Phillips, *supra; infra*, § 215, n.

[4] Rex *v.* Owen, 4 C. & P. 236; 1 Hawk. P. C. ch. 1; 1 Hale, P. C. ch. 3; Broom's Max. p. 149. In *California* it is enacted that "an infant, under the age of fourteen years, shall not be found guilty of any crime." Cal. Rev. Stat. 1850, ch. 99, § 4.

also, there is an exception; for in some cases an infant will not be held liable criminally for a mere nonfeasance, where the ability to perform the duty enjoined requires the command of his property, which is not under his control.[1]

§ 5. The subject of *insanity* has been briefly treated in the preceding volume.[2] But it is proper here to repeat, that though the law, in its charity, always presumes men innocent until they are proved guilty, yet it is also a presumption, essential to the safety of society as well as founded in experience, that every person is of sound mind until the contrary appears. And the unsoundness of mind must be established by evidence satisfactory to the jury.[3] On questions of this description, the opinions of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. But in respect to the manner in which the question is to be propounded to witnesses of this description, an important distinction is to be observed. They are not to be asked whether the facts, sworn to by other witnesses who have preceded them, amount to proof of insanity; for this, as has been observed by a learned judge, is removing the witness from the witness-box into the jury-box.[4] "Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified by others. It is for the Jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witness is this: If the symptoms and indications testified to by other witnesses are proved, and if the Jury

[1] 1 Hale, P. C. 20; 4 Bl. Comm. 22; 1 Russ. on Crimes, 2. The liability of infants for crime is fully discussed in Rex *v.* York, 1 Leading Crim. Cases, 68, and note. See also The State *v.* Goin, 9 Humph. 175.

[2] See *ante*, Vol. 2, § 372, 373.

[3] If the fact of insanity is left doubtful, upon the evidence, the court ought not to instruct the jury that insanity is proved. They must be further satisfied that the prisoner was *insane*, at the time of the act done; mere loss of memory not being sufficient. And if the homicide is proved, the barbarity of the act is held not to afford a presumption of insanity. The State *v.* Stark, 1 Strobh. 479. [Neither books of reputation on the subject of insanity, whether written by medical men or lawyers, nor published statistics of insanity, can be read to the jury unsupported by oath. Commonwealth *v.* Wilson, 1 Gray, 338.]

[4] Per Ld. Brougham, in McNaughten's case, Hans. Parl. Deb., Vol. 67, p. 728; 10 Clark and Fin. 200–212; Opinion on Insane Criminals, 8 Scott, N. R. 595.

are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances." [1]

[* The most convenient mode of putting the inquiry, and the least exceptionable one, in our judgment, is to inquire what state of mind is indicated by certain facts, assumed, or testified by certain witnesses, or in any other hypothetical form of bringing the point of inquiry to the mind of the witness. If the witness says the facts assumed indicate mental unsoundness, he may be inquired of in regard to the state and degree of mental unsoundness thus indicated, and how far it will disqualify the person for business, or render him unconscious of the nature of his conduct. He should also be inquired of, whether these facts are explainable in any other mode except upon the theory of insanity, and with what degree of certainty they indicate the inference drawn by the witness.[2]]

§ 6. In regard to insanity from *drunkenness*, we have already adverted to the distinction between criminal acts, the *immediate result* of the fit of intoxication, and committed *while it lasts*, and acts, the result of insanity remotely produced by previous habits of gross intemperance; the former being punishable and the latter not.[3] It may here be added, that drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given: because the question, in such cases, is, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and this passion is more

[1] Per Shaw, C. J., in Commonwealth *v.* Rogers, 9 Met. 500, 505; 1 Leading Crim. Cases, 87, and note. And see *ante*, Vol. 2, § 373, and note; Regina *v.* Stokes, 3 C. & K. 185; Regina *v.* Barton, 3 Cox, C. C. 275; Regina *v.* Layton, 4 Cox, C. C. 149; Freeman *v.* The People, 5 Denio, 29; The State *v.* Spencer, 1 Zabriskie, 196; Commonwealth *v.* Mosler, 4 Barr. 264. [U. S. *v.* McGlue, 1 Curt. C. C. 1; Woodbury *v.* Obear, 7 Gray, 457; Baxter *v.* Abbott, Ib. 71. See an article on the subject of medical testimony, 22 Law Reporter, 129.]

[*2] Redfield on the Law of Wills, Part 1. p. 149.]

[3] *Ante*, Vol. 2, § 374. And see The United States *v.* Drew, 5 Mason, 28; 1 Leading Crim. Cases, 113, and note; The United States *v.* Forbes, Crabbe, 558. [* People *v.* Rogers, 18 N. Y. R. 9.] ["The rule of law is, that although the use of intoxicating liquors does to some extent blind the reason and exasperate the passions, yet as a man voluntarily brings it upon himself, he cannot use it as an excuse or justification, or extenuation of crime. A man, because he is intoxicated, is not deprived of any legal advantage or protection; but he cannot avail himself of his intoxication to exempt him from any legal responsibility which would attach to him if sober." Per Shaw, C. J., in Commonwealth *v.* Hawkins, 3 Gray, 466. See, also, Haile *v.* The State, 11 Humph. 154.]

easily excited in a man when intoxicated than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered.[1] But where there is a previous determination to resent a slight affront in a barbarous manner, the state of intoxication in which the prisoner was when he committed the deed ought not to be regarded, for it furnishes no excuse.[2] And it seems, also, that if a person, by the unskilfulness of his physician, or the contrivance of evil-minded persons, should eat or drink that which causes frenzy, this puts him into the general condition of an insane person, and equally excuses him.[3]

§ 7. As to persons acting under the *constraint of superior power*, and therefore not criminally amenable, the principal case is that of a *feme covert;* who is considered by the law as so far under the power and authority of her husband, that if she commit any crime by his command or coercion, except those of treason and homicide (and perhaps some others), she is not held guilty.[4] Whether,

[1] [Eastwood *v.* The People, 3 Parker, Crim. R. 25, 4 Kern. 526; Rogers *v.* The People, Id. 632. In these cases evidence of drunkenness was admitted in trials for murder on the question of malice.]

[2] Rex *v.* Thomas, 7 C. & P. 817, per Parke, B. And see Regina *v.* Cruse, 8 C. & P. 546; Regina *v.* Monkhouse, 4 Cox, C. C. 55; Marshall's case, 1 Lewin, C. C. 76; Regina *v.* Moore, 3 C. & K. 319; The State *v.* McCaut's, 1 Speers, 384; Cornwell *v.* The State, Mart. & Yerg. 157; Swan *v.* The State, 4 Humph. 136; Haile *v.* The State, 11 Humph. 154; 1 Russ. on Crimes, 8; 3 Amer. Jur. 1–20; Rex *v.* Meakin, 7 C. & P. 297; Rex *v.* Carroll, Id. 145; The United States *v.* Drew, 1 Leading Crim. Cases, 113, and note.

[3] 1 Hale, P. C. 32; Park, J., Pearson's case, 2 Lewin, C. C. 144; Russ. Crim. Law, 2.

[4] Bl. Comm. 28, 29; 1 Hale, P. C. 45, 47, 434. Lord Hale, in the first of the places cited, excepts only *treason* and *murder*, in "regard of the heinousness of those crimes"; in the second, he excepts "*treason, murder*, or *homicide*": in the third, he excepts *treason*, *murder*, and *manslaughter*. Lord Bacon excepts *treason* only; saying that the wife is excused in cases of *felony*. Bac. Max. p. 26, 27, 32; Reg. 5, 7. And this agrees with the case in 27 Ass. 40, cited in Bro. Abr. tit. Corone, pl. 108; where it was held, that a woman arraigned of *felony*, could not be adjudged guilty; the act being done by command of her husband. Blackstone states the exception to be not only of treason, but of "crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like." 4 Bl. Comm. 29. Mr. Russell adopts this exception, and extends it to robbery also. 1 Russ. on Crimes, 18. And see Rex *v.* Stapleton, Jebb, C. C. 93. Mr. Starkie states the exception as extending not only to treason, murder, and manslaughter, but to assaults and batteries, and "any other forcible and violent misdemeanors, committed jointly by the husband and wife." 2 Stark. Evid. 399, cited with approbation by the Recorder of London, in Regina *v.* Manning, 2 C. & K. 903, n. And see, accordingly, Purcell on Crim. Pl. and Evid. p. 16, 17; Whart. Amer. Crim. Law, p. 54 (2d ed.). But in a case before Burrough, J., where a wife was indicted jointly with her husband for robbery, he directed the jury to acquit her on the ground that the law conclusively presumed that it was done by coercion of the husband. 1 C. & P. 118, note. In *Ohio*, it has been held, that coercion by the husband is to be presumed in all crimes under the degree of murder, in the commission of which she joins with him. The State *v.* Davis, 15 Ohio, 72. Whether she is entitled to the benefit of this presumption, in the case of inflicting an injury dangerous to life, with intent to murder, which is made a capital offence by Stat. 1

where the act is done *by the husband and wife jointly*, his coercion is conclusively presumed by the law, or is only to be inferred *primâ facie*, and until the contrary is shown, is a point not perfectly clear. In earlier times, it seems in such cases to have been the conclusive presumption of law, that the wife was under the husband's coercion. So Blackstone appears to have regarded it, referring to Lord Hale, and to the laws of King Ina, the West Saxon.[1] Lord Hale, in the place cited, is express, that if the wife commit larceny by coercion of the husband, she is not guilty; adding, that according to some, such is the presumption if the act be done by command of the husband, which, he says, seems to be law if the husband be present; for which he refers to the same law of Ina,[2] and to Brooke.[3] And so it was held in 16 Car. 2, by all the judges present, in a case of burglary, committed by the wife jointly with her husband.[4] Mr. Starkie adopts the same conclusion, that the presumption of law is imperative, in all cases where the husband is present and participating in the act.[5] But Lord Hale, in another part of his work,[6] expresses his own opinion that the presumption of coercion is not conclusive; but that, "if upon the evidence it can clearly appear that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband." The law was so held by Thompson, B., in a case before him,[7] on the authority of this opinion of Lord Hale; and Mr. Russell, from these and some other modern authorities, has deduced the rule to be, that if a felony be shown to have been committed by the wife, in the presence of the

Vict. c. 85, was doubted, in Regina *v.* Cruse, 8 C. & P. 541. On the principle of presumed coercion by the presence of the husband, the wife has been held not liable for larceny; Rex *v.* Knight, 1 C. & P. 116; Commonwealth *v.* Trimmer, 1 Mass. 476; Anon. 2 East, P. C. 559; receiving stolen goods, Rex *v.* Archer, 1 Moody, C. C. 143; uttering base coin, Connolly's case, 2 Lewin, C. C. 229; Rex *v.* Price, 8 C. & P. 19; and burglary, J. Kelyng, p. 31. See further, 1 Russ. on Crimes, 18, 22, with the notes of Mr. Greaves; Commonwealth *v.* Neal, 10 Mass. 152; 1 Leading Crim. Cases, 76, and note. In Commonwealth *v.* Neal, *supra*, where the husband and wife were jointly indicted for an assault and battery, it was specially found that she committed it in company with and commanded by her husband; and the court held, that she was not guilty of any civil offence, committed by the coercion of her husband, or even in his presence; and accordingly discharged her.

[1] 4 Bl. Comm. 28, 29; 1 Hale, P. C. 45.

[2] *Quoniam ipsa* (scil. fœmina) *superiori suo obedire debet.* LL. Inæ, 57.

[3] Brooke states the case, from 27 Ass. 40, of a woman indicted of felony, and held not guilty, because it was done by command of her husband; adding, ratio videtur ceo que *le ley entend'* que le feme, que est sub potestate viri, ne osa contra dire son barron. Bro. Abr. Corone, pl. 108.

[4] J. Kelyng, p. 31.

[5] 2 Stark. Evid. 399; Id. 337. And so it was held by Burrough, J., in the case cited in a preceding note to this section, from 1 C. & P. 118, note.

[6] 1 Hale, P. C. 516.

[7] Rex *v.* Hughes, Lancaster, Lent Ass. 1813; 2 Lewin, C. C. 229.

husband, the *primâ facie* presumption is, that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity in the husband to coerce.[1] The attention of the Jury must be distinctly directed to the inquiry, and their opinion taken upon the fact of coercion; and if this be not found, she will be entitled to an acquittal.[2] In all other cases, except where the husband was present, his command or coercion must be proved.[3]

§ 8. In regard to persons under *duress per minas*, the rule of law is clear, that "no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind."[4] But though a man may not, for any peril of his own life, justifiably kill an innocent person, yet, where he cannot otherwise escape, he may lawfully kill the assailant.[5] And though the fear of destruction of houses or goods is no excuse in law for a criminal act, yet force upon the person, and present fear of death, may, in some cases, excuse an act otherwise criminal, while such force and fear continue; as, for example, if one is compelled to join and remain with a party of rebels.[6]

§ 9. It may be added, that where an *idiot*, or *lunatic*, or *infant of tender age*, and too young to be conscious of guilt, is *made the instrument of mischief* by a person of discretion, the latter alone is guilty, and may be indicted and punished as the principal and sole offender. And so is the law, if one by physical force and violence impel another involuntarily, against a third person, thereby doing to the person of the latter any bodily harm.[7] And, generally, where one knowingly does a criminal act, by means of an innocent

[1] 1 Russ. on Crimes, 22. Mr. Greaves, his learned editor, collects from the cases the following propositions: 1st, that an indictment against husband and wife, jointly, is not objectionable on demurrer; nor, 2dly, is their conviction bad on error, or in arrest of judgment; 3dly, that if he were present, coercion is to be presumed, and the Jury must be directed to acquit her; unless, 4thly, it be proved, either that she was the instigator or more active party, or that he was physically incapable of coercing her. Ibid., note (g). And see, acc. Regina *v.* Cruse, 8 C. & P. 541; 2 Moody, C. C. 53; Rex *v.* Dicks, 1 Russ. on Crimes, 19; Archb. Crim. Pl. and Evid. 17; Whart. Am. Crim. Law, 54 (2d ed.); Rex *v.* Archer, 1 Moody, C. C. 143; Purcell, Crim. Pl. and Evid. 15; Bract. Lib. 3, ch. 32, § 10. See also Commonwealth *v.* Neal, 10 Mass. 152; 1 Leading Crim. Cases, 76, and note, where the law upon the responsibility of married women for crime is fully stated.

[2] Rex *v.* Archer, 1 Moody, C. C. 143.

[3] [Commonwealth *v.* Murphy, 2 Gray, 510.]

[4] Regina *v.* Tyler, 8 C. & P. 616, per Ld. Denman. [See People *v.* Stonecifer, 6 Cal. 405; Mitchell *v.* State, 22 Geo. 211.]

[5] 4 Bl. Comm. 30; 1 Hale, P. C. 51.

[6] Foster, p. 14. The rule, or condition laid down in Sir John Oldcastle's case, is, that they joined pro timore mortis, et quod recesserunt quàm cito potuerunt. 1 Hale, P. C. 50.

[7] Plowd. 19; 1 Hale, P. C. 434; 1 Rus. on Crimes, 17, 18.

agent, the employer, and not the innocent agent, is the person accountable for the act.[1]

[§ 9 *a*. In regard to the criminal liability of *corporations*, the result of the cases is, "that a corporation may be indicted for a nonfeasance, in not carrying out the provisions either of their constituting statute, or of their charter, or for a misfeasance, consisting of an offence at common law, not being treasonable, felonious, or attended with violence, or for an offence against a statute, or against a prescriptive or chartered duty." [2] But it does not follow, because a corporation is liable for the misfeasance, that the individuals who commit the act are not.[3]]

§ 10. It is a cardinal doctrine of criminal jurisprudence, de-

[1] Regina *v.* Bleasdale, 2 C. & K. 768, per Erle, J.; Regina *v.* Williams, Id. 51; Commonwealth *v.* Hill, 11 Mass. 136.

[2] Grant on Corporations (London ed. 1850), 284; Regina *v.* The Great North of England Railway Co., 9 Q. B. 315; 1 Leading Crim. Cases, 134, and note; Regina *v.* Birmingham and Gloucester Railway Co., 3 Q. B. 223; 5 Jur. 40; 1 Gale & Dav. 457; 1 Leading Crim. Cases, 127; Commonwealth *v.* New Bedford Bridge Co., 2 Gray, 339; The State *v.* Morris and Essex Railroad Co., 3 Zabriskie, 360; [State *v.* Vermont Central Railroad, 1 Wms. Vt. 103.] In England, it has recently been held, that a corporation could not be indicted for a violation of Stat. 59 Geo. 3, ch. 69, against enlisting English soldiers in foreign service. King of the Two Sicilies *v.* Wilcox, 1 Simons, N. S. 335. In America, it has been held, that a corporation cannot be indicted for a misfeasance. In Maine, it was decided that an indictment will not lie against a corporation for a nuisance in erecting a dam across a river; The State *v.* Great Works Milling and Manuf. Co., 20 Maine, 41; and in Virginia, for obstructing a highway; Commonwealth *v.* Swift Run Gap Turnpike Co., 2 Va. Cases, 362. In Regina *v.* The Great North of England Railway Co. *ubi supra*, Lord Denman, C. J., said: "Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards, or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it? But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission. Some dicta occur in old cases: 'A corporation cannot be guilty of treason or felony.' It might be added, 'of perjury, or offences against the person.' The Court of Common Pleas lately held, that a corporation might be sued in trespass; Maund *v.* Monmouthshire Canal Co., 4 M. & G. 452; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no duties, cannot be guilty in these cases; but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large. The late case of Regina *v.* Birmingham and Gloucester Railway Co., 3 Q. B. 223, was confined to the state of things then before the Court, which amounted to nonfeasance only; but was by no means intended to deny the liability of a corporation for a misfeasance." [A corporation may be sued civilly for assault and battery. E. C. Railway *v.* Broom, 6 Exch. 314.]

[3] See Regina *v.* The Great North of England Railway Co. *ubi supra*; Regina *v.* Scott, 3 Q. B. 543; Kane *v.* The People, 3 Wend. 363; Edge *v.* The Commonwealth, 7 Barr. 275.

clared in the Constitution of the United States, that *the accused has a right "to be informed of the nature and cause of the accusation"* against him; or, as it is expressed in other constitutions, to have the offence "*fully and plainly, substantially and formally described to him.*" This is the dictate of natural justice as well as a doctrine of the common law. The description, whether in an indictment, or information, or other proceeding,[1] ought to contain all that is material to constitute the crime, set forth with precision, and in the customary forms of law. And if more is alleged than is necessary, yet if it be descriptive of the offence, it must be proved. Thus, though in an indictment for arson it is sufficient if it appear that the house was another's and not the prisoner's, yet if the ownership be alleged with greater particularity, the allegation must be precisely proved, for it is descriptive of the offence. This rule is deduced from a consideration of the purposes of an indictment; which are, first, to inform the accused of the leading grounds of the charge, and thereby enable him to make his defence; secondly, to enable the court to pronounce the proper judgment affixed by law to the combination of facts alleged; and, thirdly, to enable the party to plead the judgment in bar of a second prosecution for the same offence.[2]

§ 11. It is also a general rule of criminal law in the United States, that *the party accused is entitled, as of common right, to be confronted with the witnesses against him.* This right is declared in the Constitution of the United States; and is also recognized in the constitutions or statutes of nearly all the States in the Union; but in England it has not always been conceded.[3] Sir Walter Raleigh, on his trial, earnestly demanded "that he might see his accuser face to face"; protesting against the admission of a statement in the form of the substance of an examination, taken in his absence; but this was denied him, and the examination was admitted. Informations of witnesses, against a person charged with felony, taken by a justice of the peace, or a coroner, under the statutes of Philip and Mary, and subsequent statutes on the same subject, are admitted as secondary evidence on the trial of the in-

[1] In preliminary proceedings before Justices of the Peace, in cases in which their jurisdiction is initial only, less precision is required in charging the offence than in an indictment. Commonwealth *v.* Phillips, 16 Pick. 211; Commonwealth *v.* Flynn, 3 Cush. 525.

[2] Commonwealth *v.* Wade, 17 Pick. 395, 399. And see *ante*, Vol. 1, § 65; The People *v.* Stater, 5 Hill (N. Y. Rep.), 401.

[3] 2 Hawk. P. C. b. 2, ch. 46, § 9.

dictment, by force of those statutes. And though at this day it is deemed requisite, upon the language of the statute, that informations before a justice of the peace should be taken in the presence of the prisoner,[1] yet formerly it was held otherwise;[2] and informations returned by the coroner are still by some judges held admissible, though taken in the prisoner's absence.[3] Statutes of similar import have been enacted in several of the United States;[4] but it is conceived that, under the constitutional provisions above mentioned, no deposition would be deemed admissible by force of those statutes, unless it were taken wholly in the prisoner's presence, in order to afford him the opportunity to cross-examine the witnesses; nor then, except as secondary evidence, the deponent being dead or out of the jurisdiction; or to impeach his testimony given orally at the trial.[5] Depositions are in no case admissible in criminal proceedings, unless by force of express statutes, or, perhaps, by consent of the prisoner in open court.[6]

§ 12. The *answer* to a criminal prosecution in the courts of common law, where the trial is upon the merits of the case, is, that the party is *not guilty* of the offence charged; no other form of issue being required. This plea involves a denial of every material fact alleged against him, and of course, according to the principles already stated,[7] the prosecutor is bound affirmatively to prove the whole indictment; or, as it has been quaintly expressed, to prove *Quis*, *quando*, *ubi*, *quod*, *cujus*, *quomodo*, *quare*. The allegations of *time* and *place*, however, are not material to be proved, as laid, except in those cases where they are essential either to the jurisdiction of the court, or to the specific character of the offence.[8] Thus, for example, where the night time is material to

[1] Rex *v.* Paine, 5 Mod. 163; 2 Hawk. P. C. b. 2, ch. 46, § 10; Rex *v.* Eriswell, 3 T. R. 722, 723; Rex *v.* Errington, 2 Lewin, C. C. 142; Rex *v.* Woodcock, 1 East, P. C. 356; Rex *v.* Smith, 2 Stark. R. 208. This last case was fully reviewed, and somewhat questioned, in Regina *v.* Walsh, 5 Cox, C. C. 115.

[2] Trials per Pais, 462. And see 2 Hale, P. C. 284.

[3] Rex *v.* Thatcher, T. Jones, 53. The reason given is, that they are *quasi* inquests of office, and part of the proceedings in the case. Ibid. J. Kely, 55; 3 T. R. 722; Sills *v.* Brown, 9 C. & P. 601; Bull. N. P. 242; Rex *v.* Grady, 7 C. & P. 650; Rex *v.* Coveney, Id. 667; 2 Phil. Ev. 69, 70 (9th ed.). The unsoundness of this distinction is convincingly shown by Mr. Starkie. See 2 Stark. Ev. 277–279 (6th Am. ed.). And see 2 Russ. on Crimes, 892.

[4] See *ante*, Vol. 1, § 224.

[5] See Bostick *v.* The State, 3 Humph. 344; The State *v.* Bowen, 4 McCord, 254; The State *v.* Valentine, 7 Ired. 225; N. Y. Rev. Stats. Vol. 2, p. 794, § 14. [For the rule in Massachusetts, see Gen. Stats. (1860), ch. 170, § 30.]

[6] Dominges *v.* The State, 7 Sm. & M. 475; McLane *v.* Georgia, 4 Georgia, 335. In several of the United States, depositions may, in certain contingencies, be taken and used in criminal as in civil cases. See *ante*, Vol. 1, § 321.

[7] See *ante*, Vol. 1, § 74–81.

[8] In Massachusetts, in a recent case, it was held, that on the trial of an indictment

the crime, as in burglary, or, in some States, one species of arson, it must be strictly proved. So, in prosecutions for violation of the Lord's day, and several other cases. So, where the place is stated as matter of local description, it must be proved as laid; as in indictments for forcible entry, or for stealing in a dwelling-house, and the like; or, where a penalty is given to the poor of the town or place where the offence was committed; or, where a town is indicted for neglecting to repair a highway within its bounds. But in all cases it is material to prove that the offence was committed within the county where it is laid and where the trial is had, the jurisdiction of the court and jury being limited, in criminal cases, to that county.[1]

§ 13. Another cardinal doctrine of criminal law, founded in natural justice, is, that it is the *intention* with which an act was done, that constitutes its criminality. The intent and the act must both concur, to constitute the crime.[2] *Actus non facit reum, nisi mens sit rea.*[3] And the intent must therefore be proved, as well as the other material facts in the indictment. The proof may be either by evidence, direct or indirect, tending to establish the fact; or by inference of law from other facts proved. For though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty; yet it is a rule equally sound, that every sane person must be supposed to intend that which is the ordinary and natural consequence of his own purposed act. Therefore, "where an act, *in itself indifferent*, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is *in itself unlawful*, the proof of justification or excuse lies on the

charging the defendant with being a common seller of intoxicating liquors on a particular day, evidence of sales before or after that day is inadmissible. Commonwealth *v.* Elwell, 1 Gray, 463. In this case, the general principle, that when an indictment alleges an offence as committed on a certain specified day, the day is not material, and evidence of the commission of the offence on any other day than that named, if within the period of the statute of limitations, is sufficient, was held to apply only when the offence charged consists of a single act. And that the principle is not applicable to the offence of being a common seller of spirituous liquors, which implies an offence not consisting of a single act, but of a series of acts. [*An allegation in the indictment that the offence was committed at an impossible time, as, for example, on a future day, is fatal to the pleading. State *v.* Litch, 33 Vt. 67.]

[1] 2 Russ. on Crimes, 800, 801. Therefore a special verdict finding the defendant guilty of the offence charged in the indictment, but not finding him guilty in the county where it is alleged to have been committed, cannot be supported. But such a verdict will not operate as an acquittal. Commonwealth *v.* Call, 21 Pick. 509; Rex *v.* Hazel, 1 Leach, C. C. (4th ed.) 368. And see Dyer *v.* The Commonwealth, 23 Pick. 402.

[2] 7 T. R. 514, per Ld. Kenyon. Cogitationis pœnam nemo patitur. Dig. lib. 48, tit. 19, l. 18.

[3] 3 Inst. 107; Rex *v.* Wheatly, 1 Leading Crim. Cases, 7.

defendant; and in failure thereof, the law implies a criminal intent." [1]

§ 14. This *rule*, that *every person is presumed to contemplate the ordinary and natural consequences of his own acts*, is applied even in capital cases.[2] Because men generally act deliberately and by the determination of their own will, and not from the impulse of blind passion, the law presumes that every man always thus acts, until the contrary appears. Therefore, when one man is found to have killed another, *if the circumstances of the homicide do not of themselves show that it was not intended, but was accidental*, it is to be presumed that the death of the deceased was designed by the slayer; and the burden of proof is on him to show that it was otherwise. And because, ordinarily, no man may lawfully kill another, and intentional homicides are in general the result of malice and evil passions, or proceed from "a heart regardless of social duty, and fatally bent on mischief"; in every case of intentional homicide, not otherwise explained by its circumstances, it is further to be presumed that the slayer was actuated by malice; [3] and here, also, the burden of proof is on him to show that he was not; but that the act was either justifiable or excusable.[4]

[1] Per Ld. Mansfield, in Rex *v.* Woodfall, 5 Burr. 2667.

[2] In York's case, 9 Met. 103, this rule was stated and illustrated by Shaw, C. J., in the following terms: "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life, or to do him some great bodily harm, is a necessary conclusion from the act." And see *ante*, Vol. 1, § 34; Rex *v.* Farrington, Russ. & Ry. 207; Commonwealth *v.* Webster, 5 Cush. 305.

[3] "Malice, although in its popular sense it means hatred, ill-will, or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrongful and unlawful motive or purpose; the wilful doing of an injurious act, without lawful excuse." 9 Met. 104. And see 4 B. & C. 255; Wills *v.* Noyes, 12 Pick. 324; 1 Russ. on Crimes, p. 483, n. (3d ed.); McPherson *v.* Daniels, 10 B. & C. 272, per Littledale, J.; Commonwealth *v.* Webster, 5 Cush. 304, per Shaw, C. J.

[4] See York's case, 9 Met. 103, where, upon a diversity of opinion among the learned Judges, the question whether the law implied malice from the fact of killing, underwent a masterly discussion, exhausting the whole subject. This case and its doctrines are ably examined in the North American Review for Jan. 1851, p. 178–204. See also Commonwealth *v.* Hawkins, 3 Gray, 463; Best on Presumption, § 128, 129; Best's Principles of Evidence, § 306; Alison's Crim. Law of Scotland, p. 48, 49; Rex *v.* Greenacre, 8 C. & P. 35. The State *v.* Smith, 2 Strobh. 77; Hill's case, 2 Gratt. 594; [State *v.* Knight, 43 Maine, 11; State *v.* Johnson, 3 Jones (N. C.), 266; Greene *v.* State, 28 Miss 687.] In *Ohio*, the presumption of law against the prisoner, from the mere fact of killing, is, that he committed a murder of the second degree. The State *v.* Turner,

§ 15. In the *proof of intention*, it is not always necessary that the evidence should apply directly to the particular act, with the commission of which the party is charged; for the unlawful intent in the particular case may well be inferred from a similar intent, proved to have existed in other transactions done before or after that time.[1] Thus, upon the trial of a person for maliciously shooting another, the question being whether it was done by accident or design, evidence was admitted to prove that the prisoner intentionally shot at the prosecutor at another time, about a quarter of an hour distant from the shooting charged in the indictment.[2] So upon an indictment for sending a threatening letter, the meaning and intent of the writer may be shown by other letters written, or verbal declarations made, before and after the letter in question.[3] So, upon a trial for treason in adhering to the enemy, and proof that the party was seen among the enemy's troops, evidence of a previous mistake of the prisoner in going over to a body of his own countrymen, supposing them to be enemies, was held admissible to show the intent with which he was afterwards among them.[4] So, also, in cases of homicide, evidence of former hostility and menaces on the part of the prisoner against the deceased, are admissible in proof of malice.[5] The like evidence of acts and declarations *at other times*, in proof of the character and intent of the principal

Wright, 20. So also in *Virginia*. Hill's case, *supra*. In *Georgia*, "malice shall be implied when no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." Hotchk. Dig. p. 705, § 28. The statute of *Arkansas*, Rev. Stats. 1837, div. 3, art. 1, § 4, is in nearly the same words. So is the statute of *California*. Rev. Stats. 1850, ch. 99, § 21. And of *Illinois*, Rev. Stats. 1845, ch 30, § 24.

[1] Though the evidence offered in proof of intention, or of guilty knowledge, may also prove another crime, that circumstance does not render it inadmissible, if it be receivable in all other respects. Regina *v.* Dorsett, 2 C. & K. 306. And where several larcenies were charged in one count, and the Judge directed the Jury to confine their attention to one particular charge, it was held, that the prosecutor was entitled to give evidence of all the charges, in order to show a felonious intent. Regina *v.* Bleasdale, Id. 765. But in a more recent case, upon a charge of feloniously *receiving* stolen goods, it was held, that the possession of other stolen goods, not connected with the immediate charge, was not admissible in proof of guilty knowledge; as it could not lead to any such conclusion, but, on the contrary, was quite consistent with the supposition that, on the former occasions, the goods had been *stolen by the prisoner himself*. Lord Campbell, in this case, said: "With regard to the admission in evidence of proof of previous utterings, upon indictments for uttering forged notes, I have always thought that those decisions go a great way; and I am by no means inclined to apply them to the criminal law generally." Regina *v.* Oddy, 5 Cox, C. C. 210, 215.

[2] Rex *v.* Voke, Russ. & Ry. 531. [But where a party is charged with poisoning, evidence that the prisoner poisoned another person some months before, is inadmissible. Farrar *v.* The State of Ohio, 2 Ohio, N. S. 54.]

[3] Rex *v.* Robinson, 2 Leach, C. C. (4th ed.) 749; Rex *v.* Tucker, 1 Moody, C. C. 134; Reg. *v.* Kain, 8 C. & P. 187.

[4] Malin's case, 1 Dal. 33.

[5] 1 Phil. Ev. 476.

fact charged, has been admitted in trials for arson,[1] robbery,[2] libel,[3] malicious mischief,[4] forgery,[5] conspiracy,[6] and other crimes. In regard to the distance of time between the principal fact in issue and the collateral facts proposed to be shown in proof of the intention, so far as it affects the admissibility of the evidence, no precise rule has been laid down, but the question rests in the discretion of the judge.[7] Evidence of facts transacted three months before,[8] and one month afterwards,[9] has been received to prove guilty knowledge in a charge of forgery; and evidence of facts occurring five weeks afterwards has been rejected.[10] It has been held, that, in the case of subsequent facts, they must appear to have some connection with the principal fact charged. Thus, in a charge of forgery, evidence of the *subsequent uttering* of other forged notes was held inadmissible, unless it could be shown that they were of the same manufacture.[11] But in regard to the *previous uttering* of forged notes of a different kind, though the admissibility of such evidence has been thought questionable, it is now continually admitted. For evidence that a man had uttered forged notes of different descriptions raises a presumption that he was in the habit of procuring forged notes, and that he had the criminal knowledge imputed to him.[12]

§ 16. If *several intents* are comprised in one allegation in the indictment, any one of which, being consummated by the principal fact, would constitute the crime, the allegation is divisible; and proof of either of the intents, together with the act done, is sufficient. So it has been held in the case of an assault, with intent to abuse and carnally know a female child;[13] and of a libel, with intent to defame certain magistrates named, and to bring into con-

[1] Regina *v.* Taylor, 5 Cox, C. C. 1378.

[2] Rex *v.* Winkworth, 4 C. & P. 444.

[3] Stuart *v.* Lovell, 2 Stark. R. 34; Rex *v.* Pearce, 1 Peake's Cas. 75. The same principle is applied in actions for slander. Rustell *v.* Macquister, 1 Campb. 49, n.; Charlter *v.* Barrett, 1 Peake's Cas. 22; Mead *v.* Daubigny, Id. 125; Lee *v.* Huson, Id. 166.

[4] Rex *v.* Mogg, 4 C. & P. 364; Regina *v.* Dosset, 2 C. & K. 306.

[5] Rex *v.* Wylie, 12 Russ. on Crimes, 403, 404 (3d ed.); 1 New Rep. (4 Bos. & P.) 92; The State *v.* Van Hereten, 2 Penn. 672; Hess *v.* The State, 5 Ham. 5; Reed *v.* The State, 15 Ohio, 217; The State *v.* Williams, 2 Rich. 418; Commonwealth *v.* Stearns, 10 Met. 256; Commonwealth *v.* Martin, 11 Leigh, 745; Rex *v.* Millard, Russ. & Ry. 245; Rex *v.* Taverner, 4 C. & P. 413, note (*a*).

[6] Commonwealth *v.* Eastman, 1 Cush. 189; 1 Leading Crim. Cases, 264.

[7] Rex *v.* Salisbury, 2 Russ. on Crimes, 776 (3d ed.), 5 C. & P. 115, S. C. but not S. P.

[8] Rex *v.* Ball, 1 Campb. 324; Russ. & Ry. 132. And see Rex *v.* Ball, 7 C. & P 426, 429.

[9] Rex *v.* Smith, 4 C. & P. 411.

[10] Rex *v.* Taverner, 4 C. & P. 413, note (*a*). [See Commonwealth *v.* Horton, 2 Gray, 354.]

[11] Ibid.

[12] Bayley on Bills, 619 (3d Am. ed.).

[13] Rex *v.* Dawson, 3 Stark. R. 62.

tempt the administration of justice.[1] So, of an alleged intent to defraud A., where the proof is an intent to defraud A. and B.[2]

§ 17. The *intent*, moreover, *must be proved as alleged.* If the act is alleged to have been done with intent to commit one felony, and the evidence be of an intent to commit another, though it be of the like kind, the variance is fatal. Thus, where a burglary was charged, with intent to steal the goods of W., and it appeared that no such person as W. had any property there, but that the intent was to steal the goods of D., the alleged owner of the house; and that the name of W. had been inserted by mistake, instead of D.; it was held, that the indictment was not supported.[3] So, if it be alleged that the prisoner cut the prosecutor, with intent to murder or disable him, and to do him some great bodily harm, and the evidence be merely of an intent to prevent a lawful arrest, it is a fatal variance; unless it appears that he intended the injury alleged for the purpose of preventing the arrest.[4]

§ 18. But *in the proof of an intent to defraud a particular person*,

[1] Rex *v.* Evans, 3 Stark. R. 35.

[2] Veazie's case, 7 Greenl. 131.

[3] Rex *v.* Jenks, 2 Leach, C. C. (4th ed.) 774; 2 East, P. C. 514. And see Commonwealth *v.* Shaw, 7 Met. 52, 57. A prisoner was indicted for having burglariously broken and entered the house of the prosecutor in the night time, with intent to steal the "goods and chattels" therein. The Jury found that he broke and entered with intent to steal mortgage-deeds. It was held, that, being subsisting securities for the payment of money, mortgage-deeds are *choses in action*, and, as such, were improperly described as goods and chattels. Regina *v.* Powell, 2 Denison, C. C. 403; 5 Cox, C. C. 396; 14 Eng. Law and Eq. 12, 515. There is a class of cases to which this principle does not apply. In Commonwealth *v.* Harley, 7 Met. 506, the allegation was of a conspiracy to cheat and defraud a particular individual named; and it was contended that a general intent to defraud, if it operated, when carried into effect, to defraud a particular individual, might well authorize the charge of a conspiracy to defraud such person, though that individual was not in the contemplation of the parties at the time of entering into the conspiracy, and it did not appear that the defendants had agreed to perpetrate the fraud on him particularly. But it was held, that proof that the defendant conspired to defraud the public generally, or any individual whom they might meet and be able to defraud, would not sustain the indictment, charging, as it did, a conspiracy to defraud the individual who was named in the indictment. "Although it is generally true," said Dewey, J., in Commonwealth *v.* Kellogg, 7 Cushing, 477, "that the party is to be held to have intended the legitimate effect of his acts, and, in ordinary cases of indictments for crimes, it would be quite sufficient to allege and prove the acts to have been committed against the person or property of the individual actually injured thereby, yet this principle does not fully apply to cases like the present. In an indictment for a conspiracy, the criminal offence is the act of conspiring together to do some criminal act, or to effect some object, not in itself criminal, by criminal means. The offence may be committed before the commission of any overt acts. The gist of the offence being the conspiracy preceding all such overt acts, the purpose of the conspiracy should be truly stated. If it was a general purpose to defraud, and not aimed at any particular individual; if the person, who, upon the commission of the overt acts would be defrauded, was unknown; then it would be improper to apply to the original conspiracy the purpose to defraud the party who was eventually defrauded, but not within any previous purpose or design of the conspirators, or in reference to whom the conspiracy itself had any application."

[4] Rex *v.* Boyce, 1 Moody, C. C. 29; Rex *v.* Duffin, Russ. & Ry. 365; Rex *v.* Gillow, 1 Moody, C. C. 85; 1 Lewin, C. C. 57.

it is not necessary to show that the prisoner had that particular person in his mind at the time; it is sufficient, if the act done would have the effect of defrauding him; for the law presumes that the party intended to do that which was the natural consequence of his act. Thus, where, on an indictment for uttering forged bank-notes, with intent to defraud the bank, the jury found that the intent was to defraud whoever might take the notes, but that the prisoner had in fact no intention of defrauding the bank, in particular; the conviction was held right; for it is an inference of law that the party, in such cases, intended to defraud the person who would have to pay the bill or note, if it were genuine; and this inference is to be drawn, although, from the manner of the execution of the forgery, or from the ordinary habit of caution on the part of that person, it would not be likely to impose upon him; and although, from its being a negotiable instrument, it would be likely to defraud others before it should reach him.[1]

§ 19. It may, in conclusion of this point be observed, that though, in the proof of *criminal intent* or *guilty knowledge*, any *other acts* of the party, *contemporaneous* with the principal transaction, may be given in evidence, such as, the secret possession of other forged notes or bills, or of implements for counterfeiting, or other instruments adapted to the commission of the crime charged, or the assumption of different names, or the like;[2] yet such evidence regularly ought not to be introduced, until the principal fact, constituting the *corpus delicti*, has been established.

§ 20. If a criminal act is done through *mistake or ignorance of the law*, it is nevertheless punishable as a crime. Ignorance of the municipal law is not allowed to excuse any one who is of the age of discretion, and *compos mentis*, from the penalty for the breach of it; for every such person is bound to know the law of the land, regulating his conduct, and is presumed so to do.[3] *Ignorantia juris, quod quisquis tenetur scire, neminem excusat*, is a maxim of law, recognized from the earliest times, both in England and throughout the Roman empire. Thus, if a man thinks he has a right to kill a person outlawed or excommunicated, and does so, it

[1] Rex *v.* Mazagora, Russ. & Ry. 291; Bayley on Bills, 613 (2d Am. ed.); Sheppard's case, Russ. & Ry. 169; Regina *v.* Marcus, 2 Car. & Kir. 356.

[2] See Bayley on Bills, 618, 619 (3d Am. ed.); Rex *v.* Millard, Russ. & Ry. 245; Rex *v.* Wylie, 1 New Rep. 92; 1 Leading Crim. Cases, 185; Rex *v.* Hough, Russ. & Ry. 120; Rex *v.* Harris, 7 C. & P. 429; *Infra*, § 110.

[3] Hal. P. C. 42; Doct. & Stud. Dial. 2, ch. 46; 2 Co. 3 *b*; Bilbie *v.* Lumley, 2 East, 469; Co. Lit. Pref. p. 36; Broom's Maxims, p. 122.

is murder.[1] And the rule is applied to foreigners, charged with criminal acts here, which they did not in fact know to be such, the acts not being criminal in their own country.[2]

§ 21. *Ignorance or mistake of fact* may in some cases be admitted as an excuse; as, where a man intending to do a lawful act, does that which is unlawful. Thus, where one, being alarmed in the night by the cry that thieves had broken into his house, and searching for them, with his sword, in the dark, by mistake killed an inmate of his house, he was held innocent.[3] So, if the sheep of A. stray into the flock of B., who drives and shears them, supposing them to be his own, it is not larceny in B.[4] This rule would seem to hold good, in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship, having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril.

§ 22. As it is required, in indictments, that the *names of the persons injured, and of all others whose existence is legally essential to the charge* be set forth, if known, it is, of course, material that they be precisely proved as laid. Thus, the name of the legal owner, general or special, of the goods stolen or intended to be stolen, must be alleged and proved.[5] And if the person be de-

[1] 4 Bl. Comm. 27; Plowd. 343. Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. Dig. lib. 22, tit. 6, l. 9. Lord Hale expresses it in broader terms: Ignorantia eorum, quæ quis scire tenetur, non excusat. 1 Hale, P. C. 42. This rule, in its application in civil transactions, was discussed, with great depth of research, by the learned counsel, in Haven *v.* Foster, 9 Pick. 112. It is founded in the necessities of civil government; and the dangerous extent to which the excuse of ignorance might otherwise be carried.

[2] Rex *v.* Esop, 7 C. & P. 456.

[3] Levett's case, Cro. Car. 538; 1 Hale, P. C. 42.

[4] 1 Hale, P. C. 507. And see Regina *v.* Riley, 17 Jur. 189; 1 Pearce, C. C. 149; 14 Eng. Law and Eq. R. 544; *Infra*, tit. LARCENY, § 159, and notes.

[5] Rex *v.* Jenks, 2 East, P. C. 514; 2 Leach, C. C. (4th ed.) 744; Commonwealth *v.* Clifford, 8 Cush. 215; [Regina

scribed as one whose name is to the jurors unknown, and it be proved that he was known, the variance is fatal, and the prisoner will be acquitted.[1] But this averment will be supported by proof that the name of the person could not be ascertained by any reasonable diligence.[2] If there be two persons, father and son, of the same name and resident of the same place, the father will be understood to be designated in the indictment, unless there be the addition of *junior*, or some other designation of the son.[3] And if the person, who was the subject of the crime, be described with unnecessary particularity, as, in a charge of polygamy, by marrying "E. C., *widow*," this is a matter of essential description, to be strictly proved ;[4] though, in the description of the prisoner herself,

*v.* Toole, 3 Jur. (N. S.) 420 ; S. C. 40 Eng. Law and Eq. R. 583 ;] *Infra*, tit. LARCENY.

[1] Rex *v.* Walker, 3 Camp. 264 ; Rex *v.* Robinson, 1 Holt, N. P. 595. But see Hulstead's case, 5 Leigh, 724.

[2] Regina *v.* Campbell, 1 C. & K. 82 ; Regina *v.* Stroud, Id. 187.

[3] In Rex *v.* Peace, 3 B. & Ald. 579 ; 1 Leading Crim. Cases, 226, it was held, that on the trial of an indictment for an assault upon E. E., it is sufficient to prove that an assault was committed upon a person of that name, although it appear that two persons had the same name, E. E. the elder, and E. E. the younger. In The State *v.* Vittum, 9 New Hamp. 519, the indictment alleged that the defendant committed adultery with one L. W., without any further designation. It appeared that there were in that town two individuals of that name, father and son, and that the son used the addition of "junior" to his name, and was thereby well known and distinguished from his father. It was held, that the defendant had the right to understand that the offence was charged to have been committed with the father, and that evidence of adultery with the son was not admissible in evidence. In Hodgson's case, 1 Lewin, C. C. 236 (1831), the prisoner was indicted for stealing a horse, the property of Joshua Jennings. It appeared in evidence, that the horse was the property of Joshua Jennings, the son of Joshua Jennings, the father. For the prisoner it was objected, that the person named in the indictment must be taken to be Joshua Jennings the elder. But Parke, J., on the authority of Rex *v.* Peace, overruled the objection. The same point was afterwards ruled on the same authority in Bland's case, York Summer Assizes (1832), by Bolland, B. See 1 Lewin, C. C. 236. In a recent case in Maine, the same objection was taken as in Rex *v.* Peace, and overruled. The State *v.* Grant, 22 Maine, 171. In this case, which was an indictment for larceny, the property charged to have been stolen was alleged to have been "the property of one Eusebius Emerson, of Addison, in the county of Washington." The evidence was, that there were, in that town, two persons, father and son, and that the property belonged to the son, who had usually written his name with the word "junior" attached to it. And it was held, that junior is no part of a name, and that the ownership, as alleged in the indictment, was sufficiently proved. In an indictment for perjury, a suit in the Ecclesiastical Court was stated to have been depending between A. B. and C. D. The proceedings of the suit, when produced, were between A. B. and C. D. the elder, and it was held that there was no variance. Rex *v.* Bailey, 7 C. & P. 264. In this case, Williams, J., referred to a manuscript case before Lawrence, J., where it was alleged, that there was an indictment against A. B. and C. D., at a former time ; and on the record being produced, it appeared that it was an indictment against A. B. and C. D. the younger, and the variance was held to be fatal. In assumpsit on a promissory note made by the defendant, payable to A. B., and indorsed by A. B. to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given ; but it appeared that the indorsement was in the handwriting of A. B. the son. It was held, that although *primâ facie* the presumption that A. B. the father was meant, that presumption was rebutted by the son's indorsement. Stebbing *v.* Spicer, 8 C. B. 827. See also Kincaid *v.* Howe, 10 Mass. 205.

[4] Rex *v.* Deeley, 4 C. & P. 579 ; 1 Moody, C. C. 303. The contrary had

as being "the wife of A. B.," these words have been held immaterial to be proved.[1] The *name of the prisoner* needs no proof, unless a misnomer is pleaded in abatement,[2] in which case the substance of the plea is, that he is named and called by the name of C. D., and ever since the time of his birth has always been named and called by that name; with a traverse of the name stated in the indictment. The affirmative of this issue, which is on the prisoner, is usually proved by production of the certificate of his baptism, with evidence of his identity; or by parol evidence that he has always been known and called by the name alleged in his plea, and not by the name stated in the indictment. This plea is usually answered by replying that he was and is as well known and called by the one name as by the other. But to prove this, evidence that he has once or twice been called by the name in the indictment, will not suffice.[3] Should the defendant in his plea also state that he was *baptized* by the name he alleges, it has been held, that the allegation is material, and that he must prove it.[4] But this may perhaps be questioned, as in the ordinary mode of pleading, it would be but matter of inducement to the principal allegation, namely, that he in fact had always borne a different name from that by which he was indicted.[5]

§ 23. It may be added in this place, as a rule equally applicable in criminal as in civil cases, that the *substance of the issue* must be proved. This rule has already been discussed in a preceding volume.[6]

§ 24. The same may be observed as to *the burden of proof*, the rules in regard to which have been stated in the same volume.[7]

been ruled at the assizes, in the description of the owner of goods stolen. Rex *v.* Ogilvie, 2 C. & P. 230. And see Rex *v.* Tennent, 4 C. & P. 580, n.

[1] Commonwealth *v.* Lewis, 1 Met. 151. See further on the subject of this section, *ante*, Vol. 1, § 65. In the following cases of infanticide, a variance in proving the child's name was held fatal. Clark's case, Russ. & Ry. 358; Regina *v.* Stroud, 1 C. & K. 187; 2 Moody, C. C. 270.

[2] If the defendant pleads not guilty, he cannot afterwards plead in abatement. Turns *v.* The Commonwealth, 6 Met. 235; Commonwealth *v.* Dedham, 16 Mass. 139.

[3] Mestayer *v.* Hertz, 1 M. & S. 453, per Ld. Ellenborough. [* In Rockwell *v.* State, 12 Ohio St. (N. S.) 427, where the plaintiff was indicted by the name of O. Alonzo Rockwell, and plead in abatement that his name was Orville A. Rockwell, it was held that proof that he usually signed his name and was generally called O. A. Rockwell, and that certain of his relatives called him Alonzo, was insufficient to sustain a replication that he was as well known by the first name as the last.]

[4] Holman *v.* Walden, 1 Salk. 6; Weleker *v.* Le Peletier, 1 Campb. 479.

[5] Chitty on Plead. 902, 1142; 1 Stark. Ev. 386, 390, *cum not.*

[6] See *ante*, Vol. 1, Part 2, ch. 2, *per tot.* § 56–73.

[7] See *ante*, Vol. 1, Part 2, ch. 3, § 74–81. Commonwealth *v.* McKie, 1 Gray, 61; 1 Leading Crim. Cases, 347, and note. The question as to the burden of proving the negative averment of disqualification in the defendant, arising from his *want of*

§ 25. Upon the admissibility of *evidence of character*, whether of the prisoner, or of the party on whom the crime is alleged to have been committed, there has been some fluctuation of opinion. Evidence of the prisoner's good character was formerly held to be

*license* to do the act complained of, was fully considered in The Commonwealth *v.* Thurlow, 24 Pick. 374, which was an indictment for selling spirituous liquors without license. The Chief Justice delivered the judgment of the Court upon this point in the following terms: "The last exception necessary to be considered is, that the Court ruled that the prosecutor need give no evidence in support of the negative averment, that the defendant was not duly licensed, thereby throwing on him the burden of proving that he was licensed, if he intends to rely on that fact by way of defence. The Court entertained no doubt that it is necessary to aver in the indictment, as a substantive part of the charge, that the defendant, at the time of selling, was not duly licensed. How far, and whether under various circumstances, it is necessary to prove such negative averment, is a question of great difficulty, upon which there are conflicting authorities. Cases may be suggested of great difficulty on either side of the general question. Suppose, under the English game laws, an unqualified person prosecuted for shooting game without the license of the lord of the manor, and after the alleged offence and before the trial the lord dies, and no proof of license, which may have been by parol, can be given. Shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again, suppose under the law of this Commonwealth it were made penal for any person to sell goods as a hawker and pedler, without a license from the selectmen of some town in the Commonwealth. Suppose one prosecuted for the penalty, and the indictment, as here, contains the negative averment, that he was not duly licensed. To support this negative averment, the selectmen of more than three hundred towns must be called. It may be said, that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden, to succeed without proof. This is true; but when the proceeding is upon statute, an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other, if it exists, leads to a strong inference, that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty, who should not produce a license. Besides, the common-law rules of evidence are founded upon good sense and experience, and adapted to practical use, and ought to be so applied as to accomplish the purposes for which they were framed. But the Court have not thought it necessary to decide the general question; cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise. In the present case, the Court are of opinion that the prosecutor was bound to produce *primâ facie* evidence, that the defendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all the averments necessary to constitute the substantive offence, must be proved. If there is any exception, it is from necessity, or that great difficulty, amounting, practically, to such necessity; or, in other words, where one party could not show the negative, and where the other could with perfect ease show the affirmative. But if a party is licensed as a retailer under the statutes of the Commonwealth, it must have been done by the county commissioners for the county where the cause is tried, and within one year next previous to the alleged offence. The county commissioners have a clerk, and are required by law to keep a record, or memorandum in writing, of their acts, including the granting of licenses. This proof is equally accessible to both parties, the negative averment can be proved with great facility, and therefore, in conformity to the general rule, the prosecutor ought to produce it, before he is entitled to ask a Jury to convict the party accused." 24 Pick. 380, 381. This point has since been settled otherwise, in *Massachusetts*, by Stat. 1844, ch. 102, which devolves on the defendant the burden of proving the license. [See also Gen. Stat. 1860, ch. 160.] So it is held at common law in *North Carolina;* The State *v.* Morrison, 3 Dev. 299. And in *Kentucky;* Haskill *v.* The Commonwealth, 3 B. Monr. 342. And in *Maine;* The State *v.* Crowell, 25 Maine. And in *Indiana;* Shearer *v.* The State, 7 Blackf. 99. And see *ante*, Vol. I. § 99. [As to the burden of proof of insanity, see Commonwealth *v.* Eddy, 7 Gray, 583.]

admissible, *in favorem vitæ*, in all cases of treason and felony; but this reason is now no longer given, the true question being, whether the character is in issue. "I cannot, in principle," said Mr. Justice Patteson, "make any distinction between evidence of facts and evidence of character. The latter is equally laid before the Jury, as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the Jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case."[1] The admissibility of this evidence has sometimes been restricted to *doubtful* cases;[2] but it is conceived that if the evidence is at all relevant to the issue, it is not for the judge to decide, before the evidence is all exhibited, whether the case is in fact doubtful or not; nor indeed afterwards; the weight of the evidence being a question for the Jury alone. His duty seems to be, to leave the Jury to decide, upon the whole evidence, whether an individual, whose character was previously unblemished, is or is not guilty of the crime of which he is accused.[3] But the prosecutor is not allowed to call witnesses to the general bad character of the prisoner, unless to rebut the evidence of his good character already adduced by the prisoner;[4] and even this has recently, in England, been denied.[5] The evidence, when admissible, ought to be restricted to the trait of character which is in issue; or, as it is elsewhere expressed, ought to bear some analogy and reference to the nature of the charge; it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty; or, on a trial

[1] Rex *v.* Stannard, 7 C. & P. 673. Williams, J., concurred in this opinion. And so is the law in Scotland. Alison's Pract. p. 629. The same view was taken by that eminent jurist, Chief Justice Parsons, of Massachusetts, who thought that the prisoner ought to be allowed to give his general character in evidence, in all criminal cases. Commonwealth *v.* Hardy, 2 Mass. 317. The other Judges concurred in admitting the evidence in that case, *in favorem vitæ*, it being a trial for murder; but were not prepared at that time to go further. And see The State *v.* Wells, Coxe, 424; Wills on Cir. Ev. p. 131; Commonwealth *v.* Webster, 5 Cush. 324, 325; Wharton's Am. Crim. Law, p. 233–237 (2d ed.).

[2] United States *v.* Roudenbush, 1 Baldw. 514. And see Rex *v.* Davison, 31 How. St. Tr. 217, per Ld. Ellenborough; Wills on Cir. Ev. p. 131; The State *v.* McDaniel, 8 Sm. & M. 401.

[3] 2 Russ. on Crimes, 785, 786.

[4] Bull. N. P. 296; Commonwealth *v.* Webster, 5 Cush. 325; The People *v.* White, 14 Wend. 111; Carter *v.* The Commonwealth, 2 Virg. Cas. 169; Best on Presump. § 155, p. 214; The State *v.* Merrill, 2 Dev. 269. The prisoner cannot, for this purpose, rely on the general presumption of innocence; his good character must be otherwise proved. The State *v.* Ford, 1 Strobh. 517, note.

[5] Regina *v.* Burt, 5 Coxe, C. C. 284.

for treason, to inquire into his character for honesty in his private dealings.[1]

§ 26. But it is *not in all public prosecutions* for breach of law, that evidence of the party's general character is admissible. In a trial of an information by the Attorney-General, for keeping false weights, and for offering to corrupt an officer, this evidence was rejected by Ch. Baron Eyre, who said, that it would be contrary to the true line of distinction to admit it, which is this: that in a *direct prosecution for a crime*, such evidence is admissible, but where the prosecution is not directly for the crime but for the *penalty*, as in this information, it is not.[2] It would seem, therefore, to result, that wherever, in a criminal prosecution, guilty knowledge or criminal intention is of the essence of the offence, evidence of the general character of the party is relevant to the issue, and therefore admissible; but where a penalty is claimed for the mere act, irrespective of the intention, it is not.[3]

§ 27. In regard to the *character of the person on whom the offence was committed*, no evidence is in general admissible, the character being no part of the *res gestæ*. Hence, where evidence was offered to prove that the person killed was in the habit of drinking to excess, and that drinking made him exceedingly quarrelsome, savage, and dangerous, and when intoxicated he frequently threatened the lives of his wife and others, whom the prisoner had more than once been called upon to protect against his fury; all which

[1] *Ante*, Vol. 1, § 55; 1 Phil. Ev. 469 (9th ed.); 2 Russ. on Crimes, 784; Best on Presumpt. § 153, p. 213. [* And the evidence must be confined to the prisoner's general reputation; particular facts cannot be given upon the question. Reg. *v.* Rowton, 11 Jur. (N. S.) 325.]

[2] Attorney-General *v.* Bowman, 2 B. & P. 532, note. From this case Mr. Peake has deduced the rule to be, that evidence of character is admissible only in prosecutions which subject a man to *corporal punishment*; and not in actions or informations for penalties, though founded on the fraudulent conduct of the defendant. Peake's Evid. by Norris, p. 14. But the correctness of the former branch of his rule may perhaps be questioned; inasmuch as crimes, which are *mala in se*, are in some cases punished only by a pecuniary mulct. In the Attorney-General *v.* Radloff, 26 Eng. Law and Eq. Rep. 416, which was a proceeding in the Court of Exchequer, on the part of the Attorney-General, to recover penalties by means of an information, Martin, B., said: "In criminal cases, evidence of the good character of the accused is most properly, and with good reason, admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime; but in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present, and the reason given is (as indeed it must be), that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that therefore the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed."

[3] See *supra*, § 25; Best on Presumpt. § 153, p. 213.

was matter of common notoriety; it was held rightly rejected, as having no connection with what took place at the time of the homicide.[1] The only exception to this rule is in trials for rape, or for an assault with intent to commit that crime; where the bad character of the prosecutrix for chastity may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the act for which the prisoner is indicted.[2] But on a charge of homicide, the existence of kindly relations between the deceased and the prisoner, and the expressions of goodwill and acts of kindness on the part of the latter towards the former, are always admissible in his favor.[3]

§ 28. It is further to be observed, that every criminal charge is to be tried by the rules of evidence recognized by our own laws. *Foreign rules of evidence* have no force, as such, in this country; nor have the rules of evidence in one State of the Union any force, on that account, in another State of the Union. In this respect, the law in civil and criminal cases is the same; the general rule being this, that so much of the law as affects the rights of the parties, or goes to the merits and substance of the case (*ad litis decisionem*), is adopted from the foreign country; but the law which affects the remedy only, or relates to the manner of trial (*ad litis ordinationem*), is taken from the *lex fori* of the country where the trial is had.[4] Thus, though deeds prepared and witnessed as prescribed by a statute in Scotland, are admitted to be read in the courts of that country without further proof; yet they cannot be read in the courts of England without proof by the attesting witnesses.[5] So, in some of the United States, deeds duly acknowledged and registered are, by statute, made admissible in evidence, without further proof of execution; while in others, the proof required by the common law is still demanded in all cases.[6] In respect to crimes, they are regarded by the common law as purely

[1] The State *v.* Field, 14 Maine, 244. And see York's case, 7 Law Rep. 507–509; The State *v.* Thawley, 4 Harringt. 562; Qnesenberry *v.* The State, 3 Stew. & Port. 308; The State *v.* Tilley, 3 Ired. 424. But where it was doubtful whether the killing was from a just apprehension of danger, and in self-preservation, such evidence has been held admissible. Monroe's case, 5 Georgia, 85.

[2] Rex *v.* Clarke, 2 Stark. R. 241; 1 Phil. Evid. 468 (9th ed.); Rex *v.* Barker, 3 C. & P. 589

[3] 1 Phil. Ev. 470 (9th ed.). And see further, on the subject of character in evidence, Wharton's Am. Crim. Law, pp. 233–237.

[4] Huber *v.* Steiner, 2 Bing. N. C. 202.

[5] Yates *v.* Thomson, 3 Cl. & Fin. 577, 580, per Ld. Brougham. And see Story, Confl. Laws, § 634 *a*, and note.

[6] *Ante*, Vol. 1, § 573, note; 4 Cruise's Dig. tit. 32, ch. 2, § 77, 80, notes; and ch. 29, § 1, note. See other examples in Brown *v.* Thornton, 6 Ad. & El. 185, and cases there cited; British Linen Co. *v.* Drummond, 10 B. & C. 903; Clark *v.* Mullick, 3 Moore, P. C. Rep. 252, 279, 280.

local, and therefore cognizable and punishable only in the country where they were committed. No other nation has any right to punish them; or is under any obligation to take notice of or enforce any judgment rendered in a criminal case by a foreign tribunal.[1]

§ 29. A distinction is to be noted between civil and criminal cases, in respect to the degree or *quantity of evidence* necessary to justify the jury in finding their verdict for the government. In civil cases, their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence *preponderates*, although it be not free from reasonable doubt. But in *criminal* trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law, that *the guilt of the accused must be fully proved.* Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt.[2] The oath administered to the Jurors, according to the common law, is in accordance with this distinction. In civil causes, they are sworn "well and truly to try the issue between the parties, according to law and the evidence given" them; but in criminal causes their oath is, "you shall well and truly try, *and true deliverance make*, between" (the King or State) "and the prisoner at the bar,

[1] Story, Confl. Laws, § 620 – 625; *Ante*, Vol. 1, § 378. [Where an accessory procures a crime in one State to be committed in another, he cannot be tried in the latter State for the offence of procuring the crime to be committed. State *v.* Moore, 6 Foster (N. H.), 448.]

[2] 1 Stark. Evid. 478. Quod Dubitas, ne feceris. 1 Hale, P. C. 300. And see Giles *v.* The State, 6 Georgia, 276. In Dr. Webster's case, the learned Chief Justice explained this degree of proof in the following terms: "Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of Jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." Commonwealth *v.* Webster, 5 Cush. 320.

according," &c.[1] It is elsewhere said, that the persuasion of guilt ought to amount to a moral certainty, or "such a moral certainty as convinces the minds of the tribunal as reasonable men, *beyond all reasonable doubt.*"[2] And this degree of conviction ought to be produced when the facts proved coincide with and are legally sufficient to establish the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis. For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence. *Tutius semper est errare in acquietando, quàm in puniendo; ex parte misericordiæ quàm ex parte justitiæ.*[3]

[1] 2 Hale, P. C. 293.

[2] Per Parke, B., in Rex *v.* Sterne, Surrey Sum. Ass. 1843, cited in Best, Prin. Evid. p. 100. The learned and acute reviewer of Dr. Webster's trial thinks that reasonable doubt "may, perhaps, be better described by saying, that all reasonable hesitation in the mind of the triers, respecting the truth of the hypothesis attempted to be sustained, must be removed by the proof." The North American Review, for Jan. 1851, p. 201. Reasonable certainty of the prisoner's guilt is described by Pollock, C. B., as being that degree of certainty, upon which the Jurors would act in their own grave and important concerns. See Wills on Circumst. Evid. p. 210; Regina *v.* Manning, 13 Jur. 962. If the guilt of the prisoner is to be established by a chain of circumstances, and the Jurors have a reasonable doubt in regard to any one of them, that one ought not to have any influence, in making up their verdict. Sumner *v.* The State, 5 Blackf. 579. In order to warrant a conviction of crime, on circumstantial evidence, each fact, necessary to the conclusion sought to be established, must be proved by competent evidence, beyond a reasonable doubt; all the facts must be consistent with each other, and with the main facts sought to be proved; and the circumstances taken together, must be of a conclusive nature, and leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offence charged. Commonwealth *v.* Webster, 5 Cush. 296, 313, 317–319.

[3] 2 Hale, P. C. 290; Sumner *v.* The State, 5 Blackf. 579. This sentiment of Lord Hale, as to the importance of extreme care in ascertaining the truth of every criminal charge, especially where life is involved, may be regarded as a rule of law. It is found in various places in the Mosaic code, particularly in the law respecting idolatry; which does not inflict the penalty of death until the crime "be *told* thee" (viz. in a formal accusation), "and thou hast *heard* of it" (upon legal *trial*), "and inquired *diligently*, and behold it be *true*" (satisfactorily proved), "and the thing *certain*" (beyond all reasonable doubt). Deut. xvii. 4. It was a law of Agesilaus, the Spartan king, "ut *æquilibus* votis, super vindicando facinore, in diversa trahentibus, *pro reo judicium staret, quod videbatur æquissimum.*" The same rule was adopted in Athens. Mascardus, De Probat. Vol. 1, p. 87, concl. xxxvi. n. 3. The rule of the Roman Law was in the same spirit. Satius est, impunitum relinqui facinus nocentis, quam innocentem damnare. Dig. lib. 48, tit. 19, l. 5. By the same code, prosecutors were held to the strictest proof of the charge. Sciant cuncti accusatores, eam se rem deferre in publicam notionem debere, quæ munita sit idoneis testibus, vel instructa apertissimis documentis, vel *indiciis ad probationem indubitatis et luce clarioribus* expedita. Cod. lib. 4, tit. 19, l. 25. The reason given by the civilians is one of public expediency. In dubio, reum magis [est] absolvendum quàm condemnandum; quod absolutio est favorabilis, condemnatio vero odiosa; et favores ampliandi sunt, odia vero restringenda. Mascard. ubi supra, n. 7–10. The rule in the text, quoted from Lord Hale, was familiarly known in the ancient common law of England. The *Mirror*, written at a very early period, reckons it among the abuses of the Common Law, "that Justices and their officers, who kill people by false judgment, be not destroyed as other murderers; which King *Alfred* caused to be done, who caused forty-four Justices in one year to be hanged for their false judgment." And in the recital, which follows, of their names and offences, it is said that "he hanged *Fireburne*, because he judged *Harpin* to die,

§ 30. The proof of the charge in criminal causes involves the proof of two distinct propositions: first, that the act itself was done; and, secondly, that it was done by the person charged, and by none other; — in other words, proof of the *corpus delicti*, and of the *identity of the prisoner*. It is seldom that either of these can be proved by direct testimony, and therefore the fact may lawfully be established by circumstantial evidence, provided it be satisfactory.[1] Even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance of moral certainty.[2] But it must not be forgotten that the books furnish deplorable cases of the conviction of innocent persons from the want of sufficiently certain proofs either of the *corpus delicti* or of the identity of the prisoner.[3] It is obvious that on this point no precise rule can be laid down, except that the evidence "ought to be strong and cogent,"[4] and that innocence should be presumed until the case is proved against the prisoner, in all its material circumstances, beyond any reasonable doubt.

§ 31. The *caution* necessary to be observed on this point applies with more or less force in all criminal trials, but from the nature of the case is more *frequently and urgently demanded* in prosecutions for *homicide* and for *larceny*. We have heretofore[5] adverted to the possession of the instruments or of the fruits of a crime as affording ground to presume the guilt of the possessor; but on this subject no certain rule can be laid down of universal application; the presumption being not conclusive but disputable, and

whereas the Jury were in doubt of their verdict; for, *in doubtful causes, one ought rather to save than to condemn.*" Mir. pp. 239, 240, ch. 5, sec. 1; Ab. 108, No. 15. See Best, Prin. Evid. pp. 100, 101. In the spirit of the maxim in the text, it is enacted in *Connecticut*, that "No person shall be convicted of any crime, by law punishable with death, without the testimony of at least two witnesses, or that which is equivalent thereto." Rev. Stat. 1849, tit. 6, § 159.

[1] See Mittermaier, Traitè de la Preuve en Matiere Criminelle, ch. 53, p. 416.

[2] Wills on Circumst. Evid. pp. 157, 162. An example of this is in Rex *v.* Hindmarsh, 2 Leach, C. C. 751. [*In Ruloff *v.* The People, 18 N. Y. R. 179, it is held, that, in order to warrant a conviction of murder, there must be direct proof, either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of the body. That the *corpus delicti*, in murder, has two components, — death as the result and the criminal agency of another as the means. It is only where there is direct proof of one that the other can be established by circumstantial evidence.]

[3] Mr. Wills mentions several instances of this kind, in his interesting Essay on Circumstantial Evidence, ch. iv. vii. See also Wharton's Am. Crim. Law, pp. 284, 285 (2d ed.).

[4] Per Best, J., in Rex *v.* Burdett, 4 B. & Ald 123.

[5] See *ante*, Vol. 1, § 34.

therefore to be dealt with by the jury alone, as a mere inference of fact. Its force and value will depend on several considerations. In the first place, if the fact of possession stands alone, wholly *unconnected with any other circumstances*, its value or persuasive power is *very slight;* for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt; whether it be the instrument of homicide, burglary, or other crime, or the fruits of robbery or larceny; or it may have been thrown away by the felon, in his flight, and found by the possessor, or have been taken away from him, in order to restore it to the true owner; or otherwise have come lawfully into his possession.[1] It will be necessary, therefore, for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction; such as the previous denial of the possession by the party charged, or his refusal to give any explanation of the fact, or giving false or incredible accounts of the manner of the acquisition; or that he has attempted to dispose of it, or to destroy its marks; or that he has fled or absconded, or was possessed of other stolen property, or pick-lock keys, or other instruments of crime; or was seen, or his foot-prints or clothes or other articles of his property were found near the place, and at or near the time when the crime was committed; or other circumstances naturally calculated to awaken suspicion against him, and to corroborate the inference of guilty possession.[2]

§ 32. In the next place, in order to justify the inference of guilt from the possession of the instruments or fruits of crime, it is important that it be a *recent possession*, or so soon after the commission of the crime as to be at first view not perfectly consistent with innocence. In the case of larceny, the nature of the goods is material to be considered; since, if they are such as pass readily from hand to hand, the possession, to authorize any suspicion of guilt, ought to be much more recent than though they were of a kind that circulates more slowly, or is rarely transmitted. Thus, the possession was held sufficiently recent to hold the prisoner to account for it, where the property stolen consisted of two unfinished ends of woollen cloth, of about twenty yards each, found with the prisoner two months after they were missed by the owner.[3]

[1] Best on Presumpt. § 224–226; Wills on Circumst. Evid. ch. 3, § 4.

[2] Wills on Circumst. Evid. ch. 3, § 4; Alison's Crim. Law of Scotland, pp. 320–322.

[3] Rex *v.* Partridge, 7 C. & P. 551. And

But where the subject of larceny was an axe, a saw, and a mattock, found in the possession of the prisoner three months after they were missed, the learned Judge directed an acquittal;[1] and where a shovel, which had been stolen, was found six months afterwards in the house of the prisoner, who was not then at home, the learned Judge refused to put the prisoner upon his defence.[2] An acquittal was also directed where sixteen months had elapsed since the loss of the goods.[3] But in other cases the whole matter has properly been left at large to the Jury, it being their province to consider what weight, if any, ought to be given to the evidence;[4] the general rule being this: that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecutor to show that the account is false.[5]

§ 33. But, to raise the presumption of guilt from the possession of the fruits of the instruments of crime by the prisoner, it is necessary that they be found in his *exclusive possession.* A constructive possession, like constructive notice or knowledge, though sufficient to create a *civil* liability, is not sufficient to hold the party responsible to a *criminal* charge. He can only be required to account for the possession of things which he actually and knowingly possessed; as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key. If they are found upon premises owned or occupied as well by others as himself, or in a place to which others have equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone. If the prisoner is charged as a receiver of stolen goods, which he admits that he bought, and they are subsequently found in his house, and are proved to have been stolen, this evidence has been held sufficient to justify the Jury in convicting him, without proof of his

see The State *v.* Bennett, 3 Brevard, 514; Const. R. 692; Cockin's case, 2 Lewin, C. C. 235; The State *v.* Jones, 3 Dev. & Bat. 122.

[1] Rex *v.* Adams, 3 C. & P. 600; Hall's case, 1 Cox, C. C. 231.

[2] Regina *v.* Cruttenden, 6 Jur. 267.

[3] Anon., 7 Monthly Law Mag. 58.

[4] Rex *v.* Hewlett, 2 Russ. on Crimes, 728, note by Greaves. And see The State *v.* Brewster, 7 Verm. 122; The State *v.* Weston, 9 Conn. 527; The Commonwealth *v.* Myers, Addis. 320. It is sufficient for the prisoner to raise a reasonable doubt of his guilt. The State *v.* Merrick, 19 Maine, 398; 1 Leading Crim. Cases, 360. [But see Regina *v.* Wilson, 1 Deass. & Bell, 157; s. c. 40 Eng. Law & Eq. Rep.] [* Where the circumstances attending recent possession forbid the inference that the prisoner committed the larceny, the possession, if unexplained, is evidence that he received the stolen property knowing it to have been stolen. Reg. *v.* Langmead, 9 Cox, C. C. 464.]

[5] Regina *v.* Crowhurst, 1 C. & K. 370.

having actually received them, or of his having been at the house from which they were taken.[1]

§ 34. In regard to the *suppression*, *fabrication*, or *destruction of evidence*, the common law furnishes no conclusive rule. The presumption, as we have seen in a former volume,[2] is in such cases strong against the party ; for the motive of so doing is generally a consciousness of guilt ; but the presumption of guilt is not conclusive ; because innocent persons, under the influence of terror from the danger of their situation, or induced by bad counsel, have sometimes been led to the simulation or destruction of evidence, or to prevarication and other misconduct, the usual concomitants of crime. But the burden of proof in these cases is on the prisoner, to explain his conduct to the satisfaction of the Jury.[3]

[* The introduction of false or fabricated evidence in defence is always regarded as an inferential admission of guilt, although not of a conclusive character. A case is named in the books where one was indicted for the murder of a girl nine years of age, and, to make out his defence, did attempt to substitute another girl of similar appearance, and, on the detection of this fraud, was, by its force, convicted and executed, when it subsequently turned out that the supposed murdered girl was still living. And such testimony must always be liable to more or less uncertainty in its intrinsic weight. But it seems to be admissible as a circumstance tending to show the guilt of the accused. But like other evidence, of the admissions, and the conduct of the prisoner, in regard to the main charge, their force depends so much upon the temperament, education, and habits of life and business of the accused, that no very great reliance is to be placed upon this kind of evidence, as it has no direct tendency to establish the main charge. And if the evidence, in regard to the alleged falsehood or fabrication, be doubtful, it is entitled to no weight. To be entitled to any force, as it is only circumstantial, and collateral to the main issue, its truth should be established beyond all question or cavil.[4]]

[1] Regina *v.* Matthews, 1 Denison, C. C. 596 ; 14 Jur. 513. [See Regina *v* Smith, 33 Eng. Rep. 531 ; and Regina *v.* Hobson, Ib. 527.] [* On an indictment for receiving goods, knowing them to have been stolen, the mere fact that they were found on the prisoner's premises is not sufficient to confirm the evidence of the theft, so far as to make it proper to convict. Reg. *v.* Pratt, 4 F. & F. 315.]

[2] *Ante*, Vol. 1, § 37.

[3] See, on this subject, Wills on Circumst. Evid. ch. 3, § 7 ; Best on Presumptions, § 145 – 149. Mr. Best well suggests, that cases have probably occurred, where the accused, though innocent, could not avail himself of his real defence without criminating others whom he is anxious not to injure, or criminating himself with respect to other transactions. Ibid., § 149, note (*a*).

[* 4] State *v.* Williams, 27 Vt. 226.]

§ 35. It may here be added, as a further preliminary consideration, that by the Constitution of the United States, *no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb."* [1] A similar provision exists in the constitutions of most of the States. But this rule has a deeper foundation than mere positive enactment; it being, as Mr. Justice Story remarked, imbedded in the very elements of the common law, and uniformly construed to present an insurmountable barrier to a second prosecution, where there has been a verdict of acquittal or conviction, regularly had, upon a sufficient indictment. It is upon the ground of this universal maxim of the common law, that the pleas of *autrefois acquit*, and of *autrefois convict*, are allowed in all criminal cases.[2] If the former acquittal was for want of substance in setting forth the offence, or for want of jurisdiction in the court, so that for either of these causes no valid judgment could have been rendered, it is no bar to a second prosecution; [3] but though there be error, yet if it be in the process only, the acquittal of the party is nevertheless a good bar. The sufficiency of the bar is tested by ascertaining whether he could legally have been convicted upon the previous indictment; for if he could not, his life or liberty was not in jeopardy.[4]

§ 36. The former judgment, in these cases, is pleaded with an averment that the offence charged in both indictments is the same; and the *identity of the offence*, which may be shown by parol evidence, is to be proved by the prisoner.[5] This may gen-

[1] Const. U. S. Amendm. art. 5.

[2] United States *v.* Gibert, 2 Sumn. 42. And see Vaux's case, 4 Rep. 44; 4 Bl. Comm. 335; 1 Russ. on Crimes, 837, note by Greaves; Wharton, Am. Crim. Law, 205 *et seq.* (2d ed.); 1 Chitty, Crim. Law, 452; Commonwealth *v.* Cunningham, 13 Mass. 245; Commonwealth *v.* Goddard, Id. 455; Commonwealth *v.* Roby, 12 Pick. 496, 502; The People *v.* Goodwin, 18 Johns. 187, 201. The rule in civil cases is the same. Nemo debet bis vexari, pro una et eadem causa. Broom's Maxims, 135. And see *ante*, Vol. 1, § 522–539.

[3] In Massachusetts, it has been held, that where an illegal sentence has been *served out*, it shall have at least the effect to protect the defendant from another punishment for the very same thing, although imposed according to more accurate formalties. Commonwealth *v.* Loud, 3 Met. 328. The judgment that the defendant was guilty, said Putnam, J., although upon proceedings which were erroneous, is good until reversed. This rule of criminal law is well settled. It was the right and privilege of the defendant to bring a writ of error, and reverse that judgment. But he well might waive the error, and submit to and perform the sentence, without danger of being subjected to another conviction and punishment for the same offence.

[4] Ibid.; 2 Hawk. P. C. ch. 35, § 8; Id. ch. 36, § 1, 10, 15; 2 Hale, P. C. 246–248; Commonwealth *v.* Goddard, *supra;* Whart. Amer. Crim. Law, 190–204; The People *v.* Barrett, 1 Johns. 66; Rex *v.* Emden, 9 East, 437; Commonwealth *v.* Peters, 12 Met. 387; Regina *v.* Drury, 18 Law Journal, 189; 3 Car. & Kir. 190; 3 Cox, C. C. 544.

[5] Duncan *v.* The Commonwealth, 6 Dana, 295. An approved form of this plea is given at large in Rex *v.* Sheen, 2 C. & P. 634; and in Regina *v.* Bird, 5 Cox, C. C. 11; 2 Eng. Law & Eq. Rep. 439; 1 Temple & Mew. C. C. 438, note;

erally be done by producing the record, and showing that the same evidence, which is necessary to support the second indictment, would have been admissible and sufficient to procure a legal conviction upon the first.[1] A *primâ facie* case on this point being made out by the prisoner, it will be incumbent on the prosecutor to meet it by proof that the offence, charged in the second indictment, was not the same as that charged in the first.[2] It is not necessary that the two charges should be precisely alike in form, or should correspond in things which are not essential and not material to be proved; the variance, to be fatal to the plea, must be in matter of substance. Thus, if one is indicted for murder committed on a certain day, and be acquitted, and afterwards be indicted for the murder of the same person on a different day; the former acquittal may be pleaded and shown in bar, notwithstanding the diversity of days; for the day is not material; and the offence can be committed but once.[3] But if one be indicted of an offence against the peace of the *late* king, and acquitted, and afterwards be indicted of the same offence against the peace of the *now* king; the former acquittal cannot be shown in bar of the second indictment; for evidence of an offence against the peace of one king cannot be admitted in proof of the like charge against the peace of another king.[4] Thus, also, in regard to the person slain or injured, if he be described by different names in the two indictments, and the identity of the person be averred and proved, he being known as well by the one name as the other, it is a good bar.[5] So, if one be indicted for murdering another, by compelling him to take, drink, and swallow down a certain poison called oil of vitriol, whereof he is acquitted; and he be again indicted for murdering the same person by administering to him the oil of vitriol, and forcing him to take it into his mouth, so that by the

Train and Heard's Precedents of Indictments, 481, 484.

[1] Archbold on Crim. Pl. 87; Rex *v.* Emden, 9 East, 437; Rex *v.* Clark, 1 B. & Bing. 473; Rex *v.* Taylor, 3 B. & C. 502; 1 Russ. on Crimes, 832; Commonwealth *v.* Roby, 12 Pick. 496; Rex *v.* Vandercomb, 2 Leach, C. C. (4th ed.) 768. The counsel in the case may be examined, to show from his notes, taken at the former trial, what was the evidence then given. Regina *v.* Bird, *ubi supra.*

[2] Regina *v.* Bird, 5 Cox, C. C. 11; 2 Eng. Law & Eq. Rep. 439.

[3] 2 Hale, P. C. 244. [* In order that the first of two indictments for keeping a gaming-house should bar the other, it must appear in proof that the keeping alleged in the two was without intermission; that the dates set out in the indictment show no intermission is not sufficient, as under neither need the time proved as laid, and it may be that there was an interval between the times laid. State *v.* Lindley, 14 Ind. 431.]

[4] Rex *v.* Taylor, 3 B. & C. 502; 2 Hawk. P. C. ch. 25, § 92.

[5] Rex *v.* Sheen, 2 C. & P. 634; 2 Hale, P. C. 244.

disorder, choking, suffocating, and strangling occasioned thereby he languished and died; the former acquittal is a good bar; for the substance of the charge in both cases is poisoning.[1] The same principle applies to all other criminal charges, the rule being universal, that if the first indictment were such that the prisoner *could* have been legally convicted upon it, by any evidence legally admissible, though sufficient evidence was not in fact adduced, his acquittal upon that indictment is a bar to a second indictment for the same offence.[2] This rule also applies wherever the first indictment was for a greater offence, and the second is for a less offence, which was included in the greater. Thus, if the first indictment, of which the prisoner was acquitted, was for burglary and larceny, and he be afterwards indicted for the larceny only; or if he were indicted of any other compound offence, such as robbery, murder, or the like, and acquitted, and afterwards he be indicted of any less offence which was included in the greater, such as larceny from the person, manslaughter, or the like; he may show the acquittal upon the first indictment, in bar of the second; for he might have been convicted of the less offence, upon the indictment for the greater.[3] But if, upon the first indictment, he could not have been convicted of the offence described in the second, then an acquittal upon the former is no bar to the latter. Thus, it has been held, that a conviction, upon an indictment for an assault

[1] Rex *v.* Clarke, 1 Brod. & Bing. 473; and see *ante*, Vol. 1, § 65. [A party was indicted for stealing a pair of boots laid as the property of A., and acquitted. She was then indicted again for stealing the same property, laid as the property of B., and she plead the former acquittal. Held, not a good defence. Regina *v.* Green, 37 Eng. Law & Eq. Rep. 597.] [* An acquittal of a charge of being a common seller of intoxicating liquors from a certain day to a certain other day, is no bar to a prosecution for a single unlawful sale of intoxicating liquors on a day between these two, notwithstanding this single sale may have been in evidence before the tribunal that heard and determined the alleged offence of being a common seller. Commonwealth *v.* Hudson, 14 Gray, 11. And so, a conviction of keeping a shop open on the Lord's day is no bar to an indictment for a nuisance in keeping the same shop at the same time for the illegal sale and keeping of intoxicating liquors. Commonwealth *v.* Shea, 14 Gray, 386; Commonwealth *v.* Bubser, Ib. 83.]

[2] Ibid.; Rex *v.* Sheen, 2 C. & P. 634. And see The State *v.* Ray, 1 Rice, 1.

[3] 1 Russ. on Crimes, 838, note; 2 Hale, P. C. 246; 1 Chitty, Crim. Law, 455; The State *v.* Standifer, 5 Port. 523; The People *v.* McGowan, 17 Wend. 386. [* A prosecution for any part of a single crime — as for the larceny of part only of the articles taken at one time — will bar any further prosecution for the larceny of the remaining articles. Jackson *v.* State, 14 Ind. 327. And when one is indicted for murder in the first degree, and on trial is convicted of murder in the second degree, and a new trial is ordered at his instance, he cannot be legally tried again upon the charge of murder in the first degree, but only upon the charge of murder in the second degree. State *v.* Ross, 29 Miss. 32; State *v.* Tweedy, 11 Iowa, 350; but *quære* in Livingston's case, 14 Gratt. Va. 592. And where an indictment contained nine counts for embezzlement, and fourteen for larceny, it was held, that a general verdict "guilty of embezzlement" acted as an acquittal upon the charge of larceny, and was a bar to any subsequent prosecution therefor; Selden, J., dissenting. Guenther *v.* People, 24 N. Y. 100.]

with intent to commit murder, is no bar to an indictment for the murder; for the offences are distinct in their legal character, the former being a misdemeanor, and the latter a felony; and in no case could the party, on trial for the one, be convicted of the other.[1]

§ 37. The *constitutional provision*, that no person shall be subject, for the same offence, to be *twice put in jeopardy of life or limb*, has been variously interpreted by different tribunals; for while some have held that it means nothing more than the common-law maxim, that no man shall be tried twice for the same offence, others have held, that, whenever the Jury are charged with the prisoner upon a good indictment, he is put in jeopardy; and that he cannot be again put on trial, unless the verdict was prevented by the act of God, such as the sudden illness or death of a Juror, or the illness of the prisoner, or by some other case of urgent and imperious necessity, arising without the fault or neglect of the government. Whether the impossibility of agreement by the Jury, unless by the physical coercion of famine or exhaustion, constitutes such a case of urgent necessity, justifying the court, in the exercise of its discretion, to discharge the Jury, and hold the prisoner for a second trial, is also a point on which there has been much diversity of opinion; but the affirmative, being held by the Supreme and Circuit Courts of the United States, as well as by several of the State courts, may be now regarded as the better opinion.[2]

[1] Ibid. This distinction is clearly stated and illustrated upon principle and authority in The Commonwealth *v.* Roby, 12 Pick. 496. But in The State *v.* Shepard, 7 Conn. 54, it was held, that a former conviction on an indictment for an assault with intent to commit a rape, was a good bar to an indictment for a rape; for otherwise, the party might be punished twice for a part of the facts charged in the second indictment. In this case, the case of The Commonwealth *v.* Cooper, 15 Mass. 187, was cited and relied on by the Court; but it has since been overruled, in 12 Pick. 507. *Ideo quære.* [An acquittal on a charge of manslaughter may be pleaded in bar of an indictment for murder; per Erle, J., Regina *v.* Gaylor, 40 Eng. Law & Eq. Rep. 559.]

[2] United States *v.* Perez, 9 Wheat. 579; United States *v.* Coolidge, 2 Gall. 364; United States *v.* Gibert, 2 Sumner, 19, 52–62; United States *v.* Shoemaker, 2 McLean, 114; United States *v.* Haskell, 4 Wash. 408; Commonwealth *v.* Bowden, 9 Mass. 494; Commonwealth *v.* Purchase, 2 Pick. 521; The People *v.* Olcott, 2 Johns. Cas. 301; The People *v.* Goodwin, 18 Id. 187, 200–205; Commonwealth *v.* Olds, 5 Lit. 140; Moore *v.* The State, 1 Walk. 134; The State *v.* Hall, 4 Halst. 256. In England, very recently, in a well-considered case, the same doctrine was held. Regina *v.* Newton, 13 Jur. 606; 13 Q. B. 716; 3 Cox, C. C. 489. See also Conway *v.* Regina, 7 Irish Law Rep. 149. See *contra*, Commonwealth *v.* Cook, 6 S. & R. 577; Commonwealth *v.* Clue, 3 Rawle, 498; The State *v.* Garrigues, 1 Hayw. 241; Spier's case, 1 Dev. 491; Mahala *v.* The State, 10 Yerg. 532; The State *v.* Ned, 7 Port. 188. See Wharton's Am. Crim. Law, p. 205–215, where this subject is fully considered. *Quære*, if, after the Jury have retired to delibcrate upon their verdict, one of them escapes, through the officer's negligence, so that a verdict cannot be rendered, can the prisoner be again tried? [* See opinion of Selden, J., in Guenther *v.* People, 24 N. Y. 100.

§ 38. Though the general rule is thus strongly held against a second trial in criminal cases, yet it has always been held, that, to the plea of *autrefois acquit*, or *autrefois convict*, in prosecutions for misdemeanors, it is a sufficient answer, that the former acquittal or conviction was procured by the fraud or evil practice of the prisoner himself.[1] It is not necessary to the validity of these pleas in any criminal case, that a judgment should have been entered upon the verdict;[2] but if the judgment have been arrested, the plea cannot be supported.[3]

§ 39. In trials for felony, *admissions of fact*, which the government is bound to prove, are not permitted, unless when made at the trial, in open court, by the prisoner or his counsel. Thus, where, before the trial, which was for perjury, it had been agreed by the attorneys on both sides, that the formal proofs on the part of the prosecution should be dispensed with, and that this part of the case for the prosecution should be admitted, Lord Abinger, C. B., refused to allow the admission unless it were repeated in court; and this being declined, the prisoner was acquitted.[4] But where in a previous case, upon a trial for counterfeiting, it was proposed by the counsel for the prosecution that the testimony just before given on the trial of the same prisoner on another indictment for the same offence should be admitted without calling the witnesses again, and this was consented to by the prisoner's counsel, Patteson, J., doubted whether it could be done in cases of felony, though in cases of misdemeanor it might; and therefore he directed the witnesses to be called and resworn, and then read over his own notes of their testimony, to which they assented.[5]

We now proceed to consider the evidences appropriate to distinct offences.

[1] 1 Chitty, Crim. Law, 657; Rex *v.* Bear, 1 Salk. 646; Rex *v.* Furser, Sayer, 90; Rex *v.* Davis, 1 Show. 336; Regina *v.* Coke, 12 Mod. 9; Anon., 1 Lev. 9; Rex *v.* Mawbey, 6 T. R. 619; The State *v.* Brown, 12 Conn. 54; The State *v.* Little, 1 N. Hamp. 257; Commonwealth *v.* Kinney, 2 Virg. Cas. 139.

[2] The State *v.* Norvell, 2 Yerg. 24; Mount *v.* The State, 14 Ohio R. 295. The text is to be taken, perhaps, with the qualification that the *judgment be properly arrested*. The case of Regina *v.* Reid, as reported in 1 Eng. Law and Eq. Rep. 600, per Jervis, C. J., would seem to establish a different proposition, that a judgment must be entered on the verdict to maintain the plea. But the dictum of the Chief Justice thus construed would not be law; but if rendered in connection with the case then at bar, is well enough supported. And it is to be remarked that the case as reported in 5 Cox, C. C. 111, 112, contains no expression from which such conclusion may be drawn. See, also, this case as reported in Temple & Mew. C. C. 431.

[3] Commonwealth *v.* Purchase, 2 Pick. 526.

[4] Regina *v.* Thornhill, 8 C. & P. 575.

[5] Rex *v.* Foster, 7 C. & P. 495.

# ACCESSORY.

[* § 40. Distinction between principal and accessory.
41. Principal in second degree must aid and abet the perpetrator.
42. What makes one accessory before the fact.
43. No accessories before the fact in treason nor in crimes under the degree of felony.
44. Sufficient if instructions of accessory are substantially complied with.
45. Accessory not chargeable if he repents and countermands order before execution.
46. Principal must be convicted before trial of accessory.
47. Accessories after the fact defined.
48. When husband or wife may be accessory after the fact to the other.
49. What must be charged in the indictment.
50. Proof of the offence.]

§ 40. Persons participating in a crime are either *Principals* or *Accessories*. If the crime is a felony, they are alike felons. Principals are such either in the first or second degree. *Principals* in the *first degree*, are those who are the immediate perpetrators of the act. *Principals* in the *second degree*, are those who did not with their own hands commit the act, but were present, aiding and abetting it. It is not necessary, however, that this presence be strict, actual, and immediate, so as to make the person an eye or ear witness of what passes; it may be a constructive presence. Thus, if several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him, some to commit the act, and others to watch at proper distances to prevent a surprise, or to favor the escape of the immediate actors; here, if the act be committed, all are in the eye of the law present and principals; the immediate perpetrators in the first degree, and the others in the second.[1] But if the design is only to commit a small and inconsiderable trespass, such as robbing an orchard, or the like, and one of them on a sudden affray, without the knowledge of the others, commits a felony, such, for example, as killing a pursuer, the others are not guilty

[1] Foster, Crown Law, 349, 350; 1 Russ. on Crimes, pp. 26, 27; 1 Hawk. P. C. ch. 32, § 7; Burr's case, 4 Cranch, 492, 493; 1 Hale, P. C. 439; Commonwealth *v.* Bowen, 13 Mass. 359. And see, on the subject of Accessories, Wharton's Am. Crim. Law, ch. 3 (2d ed.).

of this felony. So, where one did beat a constable, in the execution of his office, and after he had been parted from him and had entirely desisted, a friend of the party renewed the assault and killed the constable, the other party was held innocent of the killing, he having been not at all engaged after they were first separated. But if, in the former case, there had been a general resolution against all opposers; or, in the latter, a previous agreement to obstruct the constable in the execution of his office, all would have been alike guilty as principals.[1] The principal in the second degree must *be in a situation* in which he *might render his assistance*, in some manner, to the commission of the offence; and this, by agreement with the chief perpetrator.[2] But the fact of conspiracy, is not alone sufficient to raise a presumption that all the conspirators were constructively present at the commission of the crime; though it may be considered by the Jury as tending to prove their presence.[3] If, however, it is proved that the prisoner was one of the conspirators, and was in a situation in which he might have given aid to the perpetrator at the time of the act done, it will be *presumed* that he was there for that purpose, unless he shows satisfactorily that he was there for another purpose, not connected with the crime.[4] If the conspirators are alarmed and flee in different directions, and one of them maim a pursuer, to avoid being taken, the others are not to be considered as principals in that maiming.[5]

§ 41. The presence alone of the party is not sufficient to constitute him a principal in the second degree, unless he was *aiding and abetting* the perpetrator. This implies *assent* to the crime; and mere bodily presence, without any attempt to prevent the crime, though it will not of itself constitute guilty participation, is evidence from which a Jury may infer his consent and concurrence.[6] And though constructive presence consists in this, that it

[1] Foster, 351, 352, 353; Regina *v.* Howell, 9 C. & P. 437; U. States *v.* Ross, 1 Gall. 624.

[2] Foster, 350; 1 Hawk. P. C. b. 2, ch. 29, § 8; Knapp's case, 9 Pick. 518.

[3] Ibid.; Rex *v.* Bostwick, 1 Doug. 207; Harden's case, 2 Dev. & Bat. 407.

[4] Knapp's case, 9 Pick. 529. The friends of duellists, who go out with them, are present when the shot is fired, and return with them, though not acting as seconds, are principals in the second degree. Regina *v.* Young, 8 C. & P. 644.

[5] Rex *v.* White, Russ. & Ry. 99.

[6] Foster, 350; 1 Hale, P. C. 438. [* "The true rule is this: any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at the commission of a trespass without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his

encourages the principal actor with the expectation of immediate aid, yet it is not necessary to prove that the party charged as principal in the second degree was actually present, at the place assigned, during the whole transaction ; it being sufficient if he was there at the consummation of the offence.[1] Thus, if one counsel another to commit suicide, and is present at the consummation of the act, he is principal in the murder ; for it is the presumption of law, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff, or manifestly rejected and ridiculed at the time it was given.[2]

§ 42. An *accessory before the fact* is he who, being absent at the time of the felony committed, does yet procure, counsel, or command another to commit a felony.[3] Words amounting to a bare permission, will not alone constitute this offence.[4] Neither will mere concealment of the design to commit a felony.[5] It is not necessary to this degree of crime, that the connection between the accessory and the actor be immediate ; for if one procures another to cause a felony to be committed by some third person, and he does so, the procurer is accessory before the fact, though he never saw or heard of the individual finally employed to commit the crime.[6]

§ 43. There are no accessories before the fact *in treason* nor in crimes *under the degree of felony*, all persons concerned in them being considered principals,[7] nor in *manslaughter*, be-

countenance and approval, and was thereby aiding and abetting the same." Bigelow, C. J., Brown *v.* Perkins, 1 Allen 98.]

[1] Rex *v.* Dyer, 2 East. P. C. 767 ; Rex *v.* Atwell, Id. 768. If he only assists in disposing of the subject of the offence, after the crime is completed, as, in further carrying away stolen goods, he is but an accessory after the fact. Rex *v.* King, Russ. & Ry. 332 ; The People *v.* Norton, 8 Cowen, 137. [* In Breese *v.* State, 12 Ohio St. 146, it is held that if two or more persons confederate together to break open a store in the night season and steal the goods therein, and it is agreed between them, in order to facilitate the burglary and lessen the danger of detection, that one of them shall, on the night agreed on, entice the owner to a house a mile distant from the store and detain him there, while the others break into the store and remove the goods, and the confederates perform their respective parts of the agreement, the person who thus entices the owner away and detains him is constructively present at the burglary, and may be indicted as a principal offender.]

[2] Commonwealth *v.* Bowen, 13 Mass. 359 ; Rex *v.* Dyson, Russ. & Ry. 523 ; Regina *v.* Alison, 8 C. & P. 418.

[3] 1 Hale, P. C. 615. [See Reg. *v.* Tuckwell, C. & M. 215.]

[4] Hawk. P. C. b. 2, ch. 29, § 16 ; Rex *v.* Soares, Russ. & Ry. 75 ; The People *v.* Norton, 8 Cowen, 137.

[5] 1 Hale, P. C. 374.

[6] Foster, 125, 126 ; Macdaniel's case, 19 How. St. Tr. 804 ; Earl of Somerset's case, 2 Howell's St. Tr. 965 ; [Rex *v.* Cooper, 5 C. & P. 535.]

[7] [Regina *v.* Greenwood, 16 Jur. 390 ; 2 Denison, C. C. 453 ; 9 Eng. Law & Eq. R. 535 ; 5 Cox, C. C. 521 ; Regina *v.* Moland, 2 Moody, C. C. 276 ; Ward *v.* The People, 6 Hill, 144 ; State *v.* Goode, 1 Hawks, 463 ; Williams *v.* The State, 12 Sm. & M. 58 ; Commonwealth *v.* McAtee, 8 Dana, 28 ; Commonwealth *v.* Ray, 3

cause the offence is considered in law sudden and unpremeditated.[1]

§ 44. Where the principal *acts under instructions* from the accessory, it is not necessary, in order to affect the latter, that the instructions be proved to have been literally or precisely followed; it will be sufficient if it be shown that they have been *substantially complied with*.[2] Thus, if one instructs another to commit a murder by poison, and he effects it with a sword, the former is accessory to the murder, for that was the principal thing to be done, and the substance of the instruction.[3] So, if the person employed *goes beyond his instructions*, in the circumstances of the transaction, as, if the design be to rob, and in doing this he kills the party, whether upon resistance made, or for concealment of the robbery; or, if the instructions be to burn the house of A, and the flames extend to the house of B, and burn that also; the person counselling and directing is accessory to the murder, in the former case, and to the burning of the second house, in the latter; because the second crime was a probable consequence of the first, and every sane man is presumed to foresee and assume the probable consequences of his own acts.[4] So, if the party employed to commit a felony on one person, perpetrates it, *by mistake*, upon another, the party counselling is accessory to the crime actually committed.[5] But if the principal *totally and substantially departs from his instructions*, as if, being solicited to burn a house, he moreover commits a robbery while so doing, he stands single in the latter crime, and the other is not held responsible for it as accessory.[6]

§ 45. If the accessory *repents* and *countermands* the order before it is executed, and yet the principal persists and commits the crime, the party is not chargeable as accessory. But if, though repenting, he did not actually countermand the principal before the fact was done, he is guilty.[7]

Gray, 441. And *quære* whether the accessories before the fact to petty statutory offences are punishable at all. Commonwealth *v.* Willard, 22 Pick. 476, 478.] [* In California by statute no distinction exists between a principal and an accessory before the fact. People *v.* Davidson, 5 Cal. 133.]

[1] 1 Hale, P. C. 613, 615; 4 Bl. Comm. 35. [But see Regina *v.* Gaylor, 40 Eng. Law & Eq. R. 556–558.]

[2] *Ante*, Vol. 1, § 65.

[3] Foster, 369, 370.

[4] Foster, 370; 1 Russ. on Crimes, 35, *Ante*, Vol. 1, § 18; *Supra*, § 13, 14. Where a servant wrongfully placed his master's goods in a position to enable the prisoner, from whom they had been purchased, to obtain payment for them a second time, he was adjudged an accessory before the fact. Regina *v.* Manning, 17 Jur. 28; 14 Eng. Law & Eq. R. 548; 1 Pearce, C. C. 21.

[5] 1 Hale, P. C. 617; 1 Russ. on Crimes, 36; Foster, 370, 371, 372.

[6] 1 Hale, P. C. 616, 617; Foster, 369.

[7] 1 Hale, P. C. 618.

§ 46. By the common law, an accessory *cannot be put upon his separate trial*, without his consent, *until conviction of the principal;*[1] for the legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself. But an accessory to a felony committed by several, some of whom have been convicted, may be tried as accessory to a felony committed by these last; but if he is indicted and tried as accessory to a felony committed by them all, and some of them have not been proceeded against, it is error.[2] If the principal be dead, the accessory cannot, by the common law, be tried at all.[3] The conviction of the principal is sufficient, without any judgment, as *primâ facie* evidence of his guilt, to warrant the trial of the accessory; but the latter may rebut it by showing, clearly, that the principal ought not to have been convicted.[4] And it seems that in every case of the trial of an accessory, he may controvert the guilt of the principal.[5] He may also require the production of the record of his conviction, notwithstanding he has himself pleaded to the indictment; for the waiver of a right, in criminal cases, is not to be presumed.[6] If the principal is indicted for murder, and another is indicted as accessory to that crime after the fact, and upon trial the offence of the principal is reduced to manslaughter, the other may still be found guilty of being accessory to the latter crime.[7]

§ 47. *Accessories after the fact*, by the common law, are those who, *knowing* a felony to have been committed by another, *receive*,

[1] 1 Hale, P. C. 623; Phillips's case, 16 Mass. 423; 2 Burr's Trial, 440; 4 Cranch, App. 502, 503; Barron *v.* The People, 1 Parker, C. R. 246. By stats. 7 Geo. 4, ch. 64, § 9, the accessory before the fact is deemed guilty of a substantive felony, for which he may be indicted and tried, whether the principal has or has not been previously convicted. Similar statutes have been passed in several of the United States. [* An accessory may be *indicted*, but cannot be tried before conviction or outlawry of the principal. Holmes *v.* The Commonwealth, 25 Penn. St. 221. In State *v.* Chapin, 17 Ark. 561, it is held that an accessory before the fact in one State to a felony committed in another State is guilty of a crime in the State where he became accessory, and punishable there, the principal being indictable in the State where the felony was committed. In Adams *v.* The People, 1 Comstock, 173, it is held that, where an offence is committed in the State of New York, the offender being at the time without the State, and perpetrating the crime by means of an innocent agent, he can be tried in New York whenever he is brought into Court; and the fact that he owed allegiance to another State is not material unless the crime alleged be treason.]

[2] Stoops's case, 7 S. & R. 491.

[3] Phillips's case, 16 Mass. 423. On a similar question, Hullock, B., doubted, but would not stop the case; but the party being acquitted, the point was no further considered. Quinn's case, 1 Lewin, C. C. 1. See The State *v.* Ricker, 29 Maine, 84.

[4] Knapp's case, 10 Pick. 484; Williamson's case, 2 Virg. Cas. 211; Foster, 364–368; Cook *v.* Field, 3 Esp. 134.

[5] Foster, 367, 368; Macdaniel's case, 19 Howell, St. Tr. 808; 1 Russ. on Crimes, 39, 40.

[6] Andrews's case, 3 Mass. 132, 133. And see Briggs's case, 5 Pick. 429.

[7] Greenacre's case, 8 C. & P. 35.

*relieve, comfort, or assist the felon.*[1] If one opposes the apprehension of a felon, or voluntarily and intentionally suffers him to escape, or rescues him, he becomes an accessory after the fact.[2] So, if he receives or aids an accessory before the fact, it is the same as if he received or aided the principal felon.[3] But the felony must have been completed at the time, or the party is not an accessory after the fact. Thus, if the aid is given after the infliction of a mortal stroke, but before death ensues, he is not accessory to the death.[4] There must be evidence that the party charged did some act, personally, to assist the felon ;[4] but it is sufficient, if it appear that he did so by employing another person to assist him.[6]

§ 48. A *feme covert* cannot be an accessory after the fact for receiving her husband ; for it was her duty not to discover him.[7] But it is generally said that the husband may be an accessory after the fact by the receipt of his wife.[8] And though this has been questioned, because the obligations of husband and wife are reciprocal, the husband owing protection to the wife ;[9] yet it seems that it is still to be received as the rule of law. If the wife receive stolen goods, or receive a felon, of her own separate act, and without the knowledge of the husband ; or if he, knowing thereof, abandon the house, refusing to participate in the offence, she alone is guilty as an accessory.[10] And if she be guilty of procuring the husband to commit a felony, this, it seems, will make her an accessory before the fact, in the same manner as if she were sole.[11] So, also, the wife may sometimes commit the principal felony, and the husband be accessory before the fact ; as, if she utter forged documents, in his absence, but by his direction.[12]

§ 49. In the *indictment* of an *accessory before the fact*, it does not

[1] 1 Hale, P. C. 618, 622 ; 4 Bl. Comm. 37. So if he employs another to receive and assist the principal felon. Rex *v.* Jarvis, 2 M. & Rob. 40.

[2] 1 Hale, P. C. 619 ; 2 Hawk. P. C. ch. 29, § 27 ; Rex *v.* Greenacre, 8 C. & P. 35.

[3] 2 Hawk. P. C. ch. 29, § 1 ; 1 Hale, P. C. 622.

[4] 1 Hale, P. C. 622 ; 2 Hawk. P. C. ch. 29, § 35 ; 4 Bl. Comm. 38.

[5] Regina *v.* Chapple, 9 C. & P. 355.

[6] Rex *v.* Jarvis, 2 M. & Rob. 40. The reason on which the common law makes the party in these cases criminal is, that the course of public justice is hindered, and justice itself evaded, by facilitating the escape of the felon. Therefore, to buy or receive stolen goods, knowing them to be stolen, does not, at common law, make the party accessory to the theft, because he receives the goods only, and not the felon ; but he is guilty of a misdemeanor. 4 Bl. Comm. 38.

[7] 1 Hale, P. C. 621 ; 4 Bl. Comm. 38. [But she may be an accessory before the fact in her husband's crime. Regina *v.* Manning, 2 C. & K. 903.]

[8] Ibid. ; 2 Hawk. P. C. ch. 29, § 34.

[9] 1 Deacon, Crim. Law, 15.

[10] 1 Russ. on Crimes, 21 ; 1 Hale, P. C. 621.

[11] 2 Hawk, P. C. ch. 29, § 34. See also 1 Hale, P. C. 516.

[12] Rex *v.* Morris, Russ. & Ry. 270.

seem necessary to state the manner of committing the offence; it is sufficient to charge generally, that he "feloniously abetted, incited, and procured" the principal to commit it.[1] In the case of an *accessory after the fact*, it is sufficient, after stating the principal offence, to charge that he did afterwards "feloniously receive, comfort, harbor, and maintain" the principal offender.[2] And in either case, if he is indicted as accessory to two or more, and is found guilty of being accessory to one only, the conviction is good.[3]

[1] 2 Hawk. P. C. ch. 29, § 17. "To cause," says Lord Coke, "is to procure or counsel: —— To assent, is to give his assent or agreement afterwards to the procurement or counsel of another: —— To consent is to agree at the time of the procurement or counsel; and he in law is a procurer." 3 Inst 169.

[2] 1 Deacon, Crim. Law, 17; 2 Chitty, Crim. Law, 5; Archb. Crim. Pl. 820. In the indictment of an accessory, whether before or after the fact, the charge against the principal felon is first stated, with all the formality necessary in charging him alone; after which, the offence of the accessory is alleged. The body of the indictment at common law is usually after the following manner: —

1. *Against an Accessory to a Larceny, before the Fact.*

The Jurors for the (State *or* Commonwealth) of M., upon their oath present, that (*naming the principal felon*), of ———, in the county of ———, (*addition*) on the ——— day of ———, in the year of our Lord ———, at ———, in said county of ———, one silver cup, of the value of ——— dollars, of the goods and chattels of one (*naming the owner*) then and there in the possession of the said (*owner*) being found, feloniously did steal, take, and carry away, against the peace of the (State *or* Commonwealth) aforesaid. And the Jurors aforesaid, upon their oath aforesaid, do further present, that (*naming the accessory*) of ———, in the county of ———, (*addition*), before the committing of the larceny aforesaid, to wit, on the ——— day of ———, in the year ———, at ———, in the county aforesaid, did knowingly and feloniously incite, move, procure, aid, abet, counsel, hire, and command the said (*principal felon*) to do and commit the said felony and larceny, in manner and form aforesaid, against the peace of the (State *or* Commonwealth) aforesaid.

The words "and against the form of the statute (or statutes), in that case made and provided," are necessary to be added only when the indictment is founded upon a statute; otherwise, they are mere surplusage, in the case of offences at common law. 2 Hale, P. C. 190; 1 Chitty, Crim. Law, p. 289 (Perkins's ed.); Commonwealth *v.* Shattuck, 4 Cush. 141 – 143; Commonwealth *v.* Hoxey, 16 Mass. 385.

2. *Against an Accessory to any Felony, after the Fact.*

[The indictment is first framed in the usual form against the principal felon, after which it proceeds to charge the accessory as follows: —]

And the Jurors aforesaid, upon their oath aforesaid, do further present, that (*naming the accessory*), of ———, in the county of ———, (*addition*) well knowing the said (*principal felon*), to have done and committed the felony and (murder *or* robbery, &c., *as the case may be*) aforesaid, in manner and form aforesaid, afterwards, to wit, on the ——— day of ———, in the year ———, at ———, in the county aforesaid, him the said (*principal felon*) did then and there knowingly and feloniously receive, harbor, conceal, and maintain, in the felony and (murder, &c.) aforesaid, against the peace of the (State *or* Commonwealth) aforesaid.

3. *Against joint Accessories to a Murder, before the fact.*

[After alleging the murder, in the usual form, against the principal, the indictment proceeds thus: —]

And the Jurors (&c.) do further present, that J. K., of ———, &c., and G. C., of ———, &c., before the said felony and murder was committed, in manner and form aforesaid, to wit, on ———, at ———, were accessory thereto before the fact, and then and there feloniously, wilfully, and of their malice aforethought, did counsel, hire, and procure the said (*naming the principal felon*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the peace of the (State *or* Commonwealth) aforesaid. See Commonwealth *v.* Knapp, 9 Pick. 496; 10 Pick. 477.

[3] Lord Sanchar's case, 9 Co. 119; 1 Hale, P. C. 624.

If, being indicted as accessory *before the fact*, the proof is that he was *present*, aiding and abetting, he cannot be convicted of the charge in the indictment; for the proof is of a different crime, namely, of the present felony.[1] But if two are indicted together, one being charged with larceny, and the other with the substantive felony of receiving the same goods, the latter may be convicted, though the former is acquitted.[2] And if two are indicted together, the one of murder and the other as accessory after the fact, and the former be convicted of manslaughter only, the latter may also be convicted as accessory to the latter offence.[3]

§ 50. In *proof of the offence* of being accessory *before the fact*, it is necessary to show that the prisoner instigated and incited the principal to commit the crime. With respect to the degree of incitement, and the force of the persuasion used, no rule seems to have been laid down. If it was of a nature tending to induce the commission of the crime, and was so intended, it will be presumed to have led to that result, if the crime is proved. It does not seem necessary to prove, substantially, that the persuasion employed actually produced any effect, in order to maintain the indictment; nor is it a good defence that the crime would have been committed had no persuasion or incitement been employed.[4] The cases where one crime was advised, and another was perpetrated upon that advice, are all governed by one and the same principle. If the crime, committed by the principal felon, was committed under the influence of the flagitious advice of the other party, and the event, though possibly falling out beyond the original intention of the latter, was, nevertheless, in the ordinary course of things a probable consequence of that felony, he is guilty of being accessory to the crime actually committed. But if the principal, following the suggestions of his own heart, wilfully and knowingly committed a felony of another kind, on a different subject, he alone is guilty.[5]

[1] Rex *v.* Winfred Gordon et al., 2 Leach, C. C. (4th ed.) 515; 1 East, P. C. 352; 1 Russ. on Crimes, 30, 31; Regina *v.* Perkins, 12 Eng. Law & Eq. R. 587; 5 Cox, C. C. 554; 2 Denison, C. C. 459.

[2] Regina *v.* Pulham, 9 C. & P. 280. This, it is supposed, can arise only where, by statute, the offence of receiving is made a substantive felony.

[3] Per Tindal, C. J., in Rex *v.* Greenacre, 8 C. & P. 35.

[4] 2 Stark. Ev. 8. And see Commonwealth *v.* Bowen, 13 Mass. 359.

[5] Foster, 370, 371, 372; *Supra*, § 44.

# ARSON.

[* § 51. What must be charged in the indictment.
52. What is comprehended in term "dwelling-house."
53. Burning one's own house, when a crime.
54. Ownership of house, how to be charged and proved.
55. Actual burning must be proved.
56. Also felonious intent.
57. Ownership must be proved as alleged.]

§ 51. The *indictment*, at common law, for this crime, charges that the prisoner, "with force and arms, on, &c., at, &c., feloniously, wilfully, and maliciously did set fire to and burn a certain dwelling-house[1] of one J. S., there situate," &c.[2] To support the indictment, therefore, four things must be proved; namely, first, that the offence was committed upon a dwelling-house;[3] secondly, that it was the house of the person named as the owner;[4] thirdly, that it was burnt; and, fourthly, that this was done with a felonious intent.

[1] It is not necessary to allege it to be a *dwelling* house; the word "house" alone is sufficient. 3 Inst. 67; 1 Hale, P. C. 567; Commonwealth *v.* Posey, 4 Call, 109; Regina *v.* Connor, 2 Cox, C. C. 65; 2 East, P. C. 1033. See The State *v.* Sutcliffe, 4 Strobh. 372.

[2] The omission of the words "there situate" is not fatal to the indictment. Where the place is material, the place alleged in the venue, taken in connection, that the defendant then and there did the act, sufficiently designate the locality of the building set on fire. The principle is, that if it is not expressly stated where the building is situated, it shall be taken to be situated at the place named in the indictment by way of venue. Commonwealth *v.* Lamb, 1 Gray, 493; Rex *v.* Napper, 1 Moody, C. C. 46; [Commonwealth *v.* Barney, 10 Cush. 480.]

[3] The burning of other property, of various descriptions, is made punishable by statutes of the different American States, the consideration of which does not fall within the plan of this treatise.

[4] See *supra*, § 10; Commonwealth *v.* Wade, 17 Pick. 395; [Commonwealth *v.* Barney, 10 Cush. 478; Hooker *v.* State, 13 Gratt. 763.] The charge for this offence, at common law, is the following form: —

The Jurors, &c., on their oath present, that A. B., of, &c., on, &c., at, &c., the dwelling-house of one C. D., there situate, feloniously, wilfully, and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did burn and consume, against the peace of the (State *or* Commonwealth) aforesaid.

The words *wilfully* (or *voluntarily*) and *maliciously*, as well as *feloniously*, are indispensable in charging this crime. 2 East, P. C. 1033; 1 Gabbett, Crim. Law, 78; 1 Hawk. P. C. ch. 39, § 5; Rex *v.* Reader, 4 C. & P. 245. But it seems that the allegation that the act was done "wilfully" is unnecessary, as the term "maliciously" sufficiently imports that the offence was committed wilfully. Chapman *v.* The Commonwealth, 5 Wharton, 427. See Train and Heard's Precedents of Indictments, 29.

§ 52. The term *dwelling-house*, in the common law, comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like ;[1] so that if the evidence be of the burning of one of these, the averment is proved. But if the barn be no part of the mansion-house, the burning is said not to be felony, unless it have corn or hay in it.[2] If the out-house be within the same curtilage or common fence, it is taken to be parcel of the mansion-house ; but no distant barn or other building is under the same privilege ; nor is any out-house, however near, and though it be occupied by the owner of the mansion-house, if it be not parcel of the messuage, and so found to be.[3] No common enclosure is necessary, if the building be adjoining the mansion-house, and occupied as parcel thereof.[4]

§ 53. The *burning of one's own house*, the owner being also the occupant, does not amount to this crime ;[5] though it is a great misdemeanor, if it be so near other houses as to create danger to them.[6] But if the house be insured, and the owner purposely set it on fire with intent to defraud the underwriters, and thereby the adjoining house of another person be burnt, the burning of this latter house will be deemed felonious.[7]

[1] 3 Inst. 67 ; 1 Hale, P. C. 567 ; Bl. Comm. 221 ; 2 East, P. C, 1020 ; 2 Russ. on Crimes, 548. In Massachusetts, the Stat. 1804, ch. 31, § 1, refers to the dwelling-house strictly. Commonwealth *v.* Buzzell, 16 Pick. 161. [See Commonwealth *v.* Barney, 10 Cush. 480 ; Gage *v.* Shelton, 3 Rich. 242.]

[2] Ibid. ; 4 Com. Dig. 471, tit. Justices, P. 1 ; Sampson *v.* The Commonwealth, 5 Watts & Serg. 385 ; 1 Gabbett, Crim. Law, 75.

[3] Ibid. 2 East, P. C. 493, 1020 ; The State *v.* Stewart, 6 Conn. 47 ; Rex *v.* Haughton, 5 C. & P. 555.

[4] 2 East, P. C. 493, 494 ; The State *v.* Shaw, 31 Maine, 523. A common jail is a dwelling-house, if the keeper's house adjoin it, and the entrance to the prison is through the house of the keeper ; and it may be averred to be the house of the county or corporation to which it belongs. Donnevan's case, 2 W. Bl. 682 ; 2 East, P. C. 1020 ; 1 Leach, C. C. (4th ed.) 69 ; The People *v.* Cotteral, 18 Johns. 115 ; Regina *v.* Conner, 2 Cox, C. C. 65. See Stevens *v.* The Commonwealth, 4 Leigh, 683. [* In Elsmore *v.* The Hundred of St. Briavells, 8 B. & Cress. 461, it was held that a building intended for a dwelling-house, but being unfinished and never having been occupied, was not a house in respect of which burglary or arson could be committed. But the law is otherwise with regard to a dwelling-house once inhabited as such, and from which the occupant is but temporarily absent. The State *v.* McGowan, 20 Conn. 245. See also Commonwealth *v.* Squire, 1 Met. 260.]

[5] See Erskine *v.* The Commonwealth, 8 Gratt. 624. [It seems that a wife who burns her husband's house is not guilty of arson. Rex *v.* March, 1 Moody, 182. Under the New York statute, describing arson in the first degree as "wilfully setting fire to or burning in the night-time a dwelling," &c., it is held, that one who sets fire to his own house may be indicted for that crime. Shepherd *v.* The People, 19 N. Y. Rep. 537.]

[6] 1 Hale, P. C. 567, 568 ; 4 Bl. Comm. 221 ; 2 East, P. C. 1027, 1030 ; 1 Deacon, Crim. Law, 56 ; Bloss *v.* Tobey, 2 Pick. 325.

[7] Probert's case, 2 East, P. C. 1030, 1031.

§ 54. As to the *ownership* of the house, it must be laid and proved to be the house of some other person than the prisoner himself; but it is not necessary that the reversionary interest be in the occupant; it is the right of present possession, *suo jure*, at the time of the offence, which constitutes the ownership required by the common law.[1] Therefore, this crime may be committed by one entitled to dower in the house, which has not been assigned;[2] or, by the reversioner, who maliciously burns the house in the possession of his tenant.[3] On the other hand, if the lessee or the mortgagor burns the house in his own possession, it is not arson.[4] But where a parish pauper maliciously burned the house in which he had been placed rent-free by the overseers of the poor, who were the lessees, he was adjudged guilty of arson; for he had no interest in the house, but was merely a servant, by whom the overseers had the possession.[5]

§ 55. There must also be proof of an *actual burning* of the house. It is not necessary that the entire building be destroyed; it is sufficient that fire be set to it, and that some part of it, however small, be decomposed by the fire, though the fire be extinguished or go out of itself.[6] But an attempt to set fire to the house, by putting fire into it, if it do not take, and no part of the

[1] 2 East, P. C. 1022, 1025; 2 Russ. on Crimes, 564, 565; The People *v.* Van Blarcum, 2 Johns. 105. [In New York it is arson in the third degree for the owner of a house which is insured to set it on fire with the intent to prejudice the insurers, but the indictment must allege that the house is insured, and that it was set on fire to injure the insurers. People *v.* Henderson, 1 Parker, C. R. 56.] [* Arson is a crime against the security of a dwelling-house as such, and not against the building as property; and it is therefore proper, in an indictment for the crime, to describe the house burned as the house of the person dwelling in it, without reference to the question of ownership. Where there is no interior communication between different parts of the same building, or if there is, it is not in actual use, and the occupancy of the parts is strictly in severalty, the parts would be regarded as separate buildings. State *v.* Toole, 29 Conn. 342.

In Maine, proof of actual occupation and possession is sufficient evidence of the allegation of ownership. State *v.* Taylor, 45 Maine, 322.]

[2] Rex *v* Harris, Foster, 113–115.

[3] Ibid.; 2 East, P. C. 1024, 1025.

[4] Rex *v.* Holmes, Cro. Car. 376; W. Jones, 351; Rex *v.* Pedley, 1 Leach, C. L. (4th ed.) 242; Rex *v.* Scholfield, Cald. 397; 2 East, P. C. 1023, 1025–1028; 2 Russ. on Crimes, 550, 551. [**It seems* that even at common law, as well as under the Ohio statutes, the tenant may be accessory before the fact to arson of the building he occupies. Allen *v.* State, 10 Ohio St. (N. S.) 287.]

[5] Rex *v.* Gowen, 2 East, P. C. 1027; Rex *v.* Rickman, Id. 1034.

[6] Whether a building has been so affected by fire as to constitute a burning within the legal meaning of the term, is a question of fact to be determined by the Jury upon the evidence. Commonwealth *v.* Betton, 5 Cush. 427. [* In an indictment upon the statute providing for the punishment of any person who shall burn any building, it is sufficient to allege that he "set fire to" such building, — the terms being equivalent. State *v.* Taylor, 45 Maine, 322. In Vermont, it is sufficient if fire be applied to, or in immediate contact with, the building, with the intent to burn it, though such intent be not carried out. State *v.* Dennin, 32 Vt. 158.]

house be burnt, though the combustibles themselves are consumed, is not arson, at the common law.[1]

§ 56. There must also be proof of a *felonious intent*. This allegation is not supported by any evidence of mere negligence or mischance ;[2] nor by proof of an intent to do some other unlawful act, without malice, such as if one, in shooting with a gun, in violation of the game laws, or in shooting at the poultry of another, should happen to set fire to the thatch of the house,[3] or the like. But if he intended to steal the poultry, the intent being felonious, he is liable criminally for all the consequences.[4] It is not necessary, however, that the burning should correspond with the precise intent of the party ; for if intending to burn the house of A., the fire should, even against his will, burn the house of B., and not that of A., it is felony.[5] It is a general rule of penal law, that where a felonious design against one man misses its aim, and takes effect upon another, it shall have the like construction as if it had been directed against him who suffers by it.[6] Therefore it has been said, that if one command another to burn the house of A., and by mistake or accident the servant burns the house of B., the principal is guilty of felony for this latter burning.[7] And if one, by wilfully setting fire to his own house, burn the house of his neighbor, which was so near that the burning of it would be the natural and probable consequence of burning his own house, it is felony.[8]

§ 57. The *evidence of ownership* must correspond with the alle-

[1] 3 Inst. 66 ; 4 Bl. Comm. 222 ; 1 Hale, P. C. 568 ; 1 Gabbett, Crim. Law, 75 ; 2 East, P. C. 1020 ; Rex *v.* Taylor, 1 Leach, C. C. (4th ed.) 58 ; Commonwealth *v.* Van Schaack, 16 Mass. 105 ; The People *v.* Butler, 16 Johns. 203 ; 1 Hawk. P. C. ch. 39, § 17. Where the witness testified that "the floor near the hearth had been scorched ; it was charred in a trifling way ; it had been at a red heat, but not in a blaze" ; this was thought, by Parke, B., to be sufficient proof of arson. But the witness, on further examination, having stated that he had not examined the floor, to ascertain how deep the charring went in, neither could he at all form a judgment as to how long it had been done, the Court (per Bosanquet, J.) told the Jury that this evidence was much too slight, and that they ought to acquit. Regina *v.* Parker, 9 C. & P. 45. But where a small fagot having been set on fire on the boarded floor of a room, the boards were thereby "scorched black but not burnt," and no part of the wood was consumed, that was held not sufficient. Regina *v.* Russell, C. & M. 541. And see The State *v.* Sandy, 3 Ired. 570. Where fire was placed in a roof composed of wood and straw, producing smoke and burnt ashes in the straw, this was held a setting on fire, though there was no appearance of fire itself. Rex *v.* Stallion, 1 Moody, C. C. 398.

[2] 3 Inst. 67 ; 4 Bl. Comm. 222. [But see Rex *v.* Cooper, 5 C. & P. 535.]

[3] 1 Hale, P. C. 569. And see The State *v.* Mitchell, 5 Ired. 350.

[4] 2 East, P. C. 1019 ; 2 Russ. on Crimes, 549.

[5] Ibid. ; 1 Hawk. P. C. ch. 39, § 19.

[6] See *Supra*, § 17, 18.

[7] Lamb. Eirenar. b. 2, ch. 7, fol. 282 ; Plowd. 475 ; 2 East, P. C. 1019.

[8] 2 East, P. C. 1031 ; Rex *v.* Isaac, Ibid. ; Rex *v.* Probert, Id. 1030, per Grose, J. ; *Supra*, § 44.

gation in the indictment, or it will be fatal.[1] If the indictment charges the burning of an *out-house*, it is proved by evidence of the burning of such a building, though for some purposes it were part of the dwelling-house.[2] If the offence be laid to have been done in the *night-time*, this allegation needs not be proved, if the indictment is at common law; for it is not material, unless made so by statute.[3] Actual participation in the crime may be shown by the guilty possession of goods proved to have been in the house at the time of the act done, even though such possession may amount to another felony.[4]

[1] Rex *v.* Rickman, 2 East, P. C. 1034; Rex *v.* Pedley, Id. 1026; The People *v.* Stater, 5 Hill (N. Y.), R. 401; Commonwealth *v.* Wade, 17 Pick. 395; The State *v.* Lyon, 12 Conn. 487; *Supra*, § 10; *Ante*, Vol. 1, § 65. In Massachusetts, it is provided by statute, that in the prosecution of any offence, committed upon or in relation to, or in any way affecting any real estate, it shall be sufficient, and shall not be deemed a variance, if it be proved on the trial, that, at the time when the offence was committed, either the actual or constructive possession, or the general or special property in the whole, or in any part of such real estate, was in the person or community, alleged in the indictment or other accusation, to be the owner thereof. Rev. Stats. ch. 133, § 11. Thus, where an indictment alleged the ownership of a building to be in one W., and the proof was, that said W. was joint lessee with another person, it was held, that the statute entirely obviated the objection of a variance. Commonwealth *v.* Harney, 10 Met. 422.

[2] Rex *v.* North, 2 East, P. C. 1021, 1022.

[3] Rex *v.* Minton, 2 East, P. C. 1021.

[4] Rex *v.* Rickman, 2 East, P. C. 1034; *Supra*, § 31, 32, 33.

## ASSAULT.

[* § 58. What the indictment charges.
59. What constitutes an assault.
60. And what a battery.
61. Intention to do injury essential to be proved.
62. Negatived by proof of accident in lawful act.
63. Assault in performance of lawful act not criminal.
64. Self-defence justifies sufficient force to repel assault.
65. Other acts justifying assault.]

§ 58. The *indictment* for a common assault charges that the offender, at such a time and place, "with force and arms, in and upon one C. D., in the peace of this (State or Commonwealth), then and there being,[1] an assault did make, and him the said C. D. then and there did beat, wound, and ill-treat, and other wrongs to the said C. D. then and there did, against the peace," &c. If there are circumstances of aggravation, not amounting to a distinct offence, they are alleged before the *alia enormia*.

§ 59. An *assault* is defined by writers on criminal law to be an intentional attempt by force to do an injury to the person of another.[2] This allegation, therefore, is proved by *evidence* of striking at another with or without a weapon, and whether the aim be missed or not; or of drawing a sword upon him; or of throwing any missile at him; or of presenting a gun or pistol at him; the person assaulted being within probable reach of the weapon or missile.[3] So, if one rushes upon another or pursues him with intent to strike, and in a threatening attitude, but is stopped immediately before he was within reach of the person aimed at, it is an

[1] This allegation is unnecessary. Commonwealth *v.* Murphy, 6 Monthly Law Reporter, N. S. 460; The State *v.* Elliott, 7 Blackf. 280. [* In an indictment for an assault with a dangerous weapon, under the United States statute, the word "assault" carries with it an allegation of illegality. United States *v.* Lunt, Sprague's Decisions, 311. An indictment for an assault in one town is supported by proof of an assault in another town in the same county, and within the jurisdiction of the court. Commonwealth *v.* Tolliver, 8 Gray, 386; Commonwealth *v.* Creed, Ib. 387.]

[2] Whart. Am. Crim. Law, p. 460; 1 Russ. on Crimes, 750. And see *ante*, Vol. 2, § 82.

[3] 1 Russ. on Crimes, 750; 1 Hawk, P. C. ch. 62, § 1; The United States *v.* Hand, 2 Wash. C. C. Rep. 435. [* Johnson *v.* State, 35 Ala. 363.]

assault.[1] Whether it be an assault to present a gun or pistol not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.[2] So, an assault is proved by evidence of indecent liberties taken with a female, if it be taken without her consent; and such consent a child under ten years of age is incapable of giving;[3] but above that age she may be capable.[4] So, if possession of a married woman's person is indecently and fraudulently obtained in the night, by one falsely assuming to be her husband, it is an assault; and her submission under such mistake is no evidence of consent.[5] It is the same if a medical man indecently remove the garments from the person of a female patient, under the false and fraudulent pretence that he cannot otherwise judge of the cause of her illness.[6] So, if a schoolmaster take indecent liberties with the person of a female scholar without her consent, though she do not resist, it is an assault.[7] So, to cut off the hair of a pauper in an almshouse against her consent, though under a rule of the house, is an as-

[1] Stephen *v.* Myers, 4 C. & P. 349. So, if the distance be such as to put a man of ordinary firmness under the apprehension of a blow. The State *v.* Davis, 1 Ired. 125. See further, *ante*, Vol. 2, § 82, 84.

[2] In Regina *v.* St. George, 9 C. & P. 483, Parke, B. held it to be an assault. So it was held in The State *v.* Smith, 2 Humph. 457. [* State *v.* Shepard, 10 Iowa, 126.] And see 3 Sm. & Marsh. 553; The State *v.* Benedict, 11 Verm. 236; [Morison's case, 1 Broun, 394, 395; Beach *v.* Hancock, 7 Foster, 223.] But see *contra*, Blake *v.* Barnard, 9 C. & P. 626. See also Regina *v.* Baker, 1 C. & K. 254; Regina *v.* James, Id. 530, which, however, were cases upon the statute of 1 Vict. ch. 85, § 3. [* In Richels *v.* State, 1 Sneed (Tenn.), 606, it is held that the intent to injure is of the essence of an assault, and pointing a loaded pistol is evidence, but not conclusive, of such intent.]

[3] Regina *v.* Banks, 8 C. & P. 574; Regina *v.* Day, 9 C. & P. 722. There is a difference between *consent* and *submission*; every *consent* involves submission; but it by no means follows that a mere *submission* involves consent. It would be too much to say that an adult, submitting quietly to an outrage of this description, was not *consenting*; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. Ibid. per Coleridge, J.

[4] Regina *v.* Meredith, 8 C. & P. 589; Regina *v.* Martin, 9 C. & P. 213. See Regina *v.* Read, 1 Denison, C. C. 377; 3 Cox, C. C. 266; 2 Car. & Kir. 957; Temple *v.* Mew, C. C. 52. Where the prisoners, having been convicted of a common assault on a girl of nine years of age, she having been an assenting party to the connection which took place, though, from her tender years, she did not know what she was about, the conviction was held wrong, upon the authority of Regina *v.* Martin, 2 Moody, C. C. 123. See the grounds of that case explained by Patteson, J., 9 C. & P. 215.

[5] Regina *v.* Saunders, 8 C. & P. 265; Regina *v.* Williams, Id. 286; Regina *v.* Clarke, 6 Cox, C. C. 412; 1 Leading Crim. Cases, 232, affirming Rex *v.* Jackson, Russ. & Ry. C. C. 487; 1 Leading Crim. Cases, 234.

[6] Rex *v.* Rosinski, 1 Moody, C. C. 12; 1 Russ. on Crimes, 606. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case, this was held to be certainly an assault and probably a rape. Regina *v.* Case, 4 Cox, C. C. 220; 1 Denison, C. C. 580; Temple *v.* Mew, C. C. 31; 1 Eng. Law & Eq. R. 544.

[7] Regina *v.* M'Gavaran, 6 Cox, C. C. 64; Rex *v.* Nichol, Russ. & Ry. C. C. 130; Regina *v.* Day, 9 C. & P. 722.

sault, the rule being illegal; and if it be done with intent to degrade her, and not for the sake of personal cleanliness, it is an aggravation of the offence.[1] Evidence that the party knowingly put into another's food a deleterious drug, to cause him to take it, and it be taken, is sufficient to support the charge of an assault.[2]

§ 60. A *battery* is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person. Every battery, therefore, includes an assault, though an assault does not necessarily imply a battery. But in treating of this offence, no further notice needs to be taken of this distinction, as its effect ordinarily is only upon the degree of punishment to be inflicted.

§ 61. It is to be observed, that although an *unintentional injury*, done with force to the person of another, may support a *civil action* of trespass for damages;[3] yet to constitute the *criminal offence* of an assault, the *intention to do injury* is essential to be proved. If, therefore, though the attitude be threatening, it is so explained by the simultaneous language as to negative any present intention to do harm, as, for example, that "he would strike if it were not assize-time,"[4] or "if he were not an old man,"[5] or the like, it is not an assault. Though it is difficult in practice to draw the precise line which separates violence menaced from violence actually commenced, yet the rule seems to be this, that where the purpose of violence is accompanied by an act which, if not prevented, would cause personal injury, the violence is begun, and of course the offence is committed.[6] And it seems not to be necessary that the violence should be menaced absolutely; it may be conditionally threatened; for if one raise a weapon against another, within striking distance, threatening to strike unless the other performs a certain act which he thereupon performs, and so the violence proposed is not actually inflicted; it is nevertheless an assault.[7]

§ 62. The *intention to do harm is negatived* by evidence that the injury was the result of *mere accident;* as, if one soldier hurts an-

[1] Forde *v.* Skinner, 4 C. & P. 239.

[2] Regina *v.* Button, 8 C. & P. 660. This case has been overruled. See Regina *v.* Dilworth, 2 M. & Rob. 53; Regina *v.* Hanson, 2 C. & K. 912; Regina *v.* Walkden, 1 Cox, C. C. 282.

[3] See *ante*, Vol. 2, § 94.

[4] Anon., 1 Mod. 3; Turbeville *v.* Savage, 2 Keb. 545.

[5] Commonwealth *v.* Eyre, 1 S. & R. 347; The State *v.* Crow, 1 Ired. 375. And see *ante*, Vol. 2, § 83.

[6] The State *v.* Davis, 1 Ired. 128.

[7] The State *v.* Morgan, 3 Ired. 186. [And see United States *v.* Myers, 1 Cranch, C. C. 310; United States *v.* Richardson, 5 Id. 348; Bloomer *v.* State, 3 Sneed, 66; Read *v.* Coker, 24 Eng. Law & Eq. R. 213.]

other by the discharge of his musket in military exercise ;[1] or, if one's horse, being rendered ungovernable by sudden fright, runs against a man ;[2] or, if a thing which one is handling in the course of his employment be carried by the force of the wind against another man, to his hurt.[3] But in these cases, as we have heretofore shown in civil actions, it must appear that the act in which the defendant was engaged was lawful, and the necessity or accident inevitable and without his fault.[4] If the act were done by *consent*, in a *lawful athletic sport or game*, not dangerous in its tendency, it is not an assault ; but if it were done in an *unlawful sport*, as a boxing-match, or prize-fight, it is otherwise.[5]

§ 63. The *criminality* of this charge may also be disproved by evidence showing that the *act was lawful ;* as, if a parent in a reasonable manner corrects his child ; or, a master his apprentice ; or, a schoolmaster his scholar ;[6] or, if one, having the care of an imbecile or insane person, confines him by force ; or, if any one restrains a madman ; in these, and the like cases, it is not a criminal assault.[7] So, if a shipmaster corrects a seaman for negligence or misconduct in any matter relating to his duty as one of the ship's crew, or tending directly to the subversion or the discipline and police of the ship.[8] But in all these cases the correction or restraint must be reasonable, and not disproportionate to the requirements of the case at the time.

§ 64. The act may also be justified by evidence that it was done in *self-defence*. There is no doubt that any man may protect his person from assault and injury by opposing force to force ; nor is he obliged to wait until he is struck ; for if a weapon be lifted in

[1] Weaver *v.* Ward, Hob. 134.

[2] Gibbons *v.* Pepper, 4 Mod. 405.

[3] Rex *v.* Gill, 1 Stra. 190.

[4] Dickenson *v.* Watson, T. Jones, 205 ; 1 Russ. on Crimes, 754. See *ante*, Vol. 2, § 85, 94, and cases there cited.

[5] See *ante*, Vol. 2, § 85, and cases there cited ; 1 Russ. on Crimes, 753.

[6] The State *v.* Pendergrass, 2 Dev. & Battle, 365. [A schoolmaster is liable criminally, if, in inflicting punishment upon his pupil, he goes beyond the limit of reasonable castigation, and, either in the mode or degree of correction, is guilty of any unreasonable and disproportionate violence or force ; and whether the punishment was excessive under the circumstances of any case is a question for the Jury. Commonwealth *v.* Randall, 4 Gray, 36.]

[7] Hawk. P. C. b. 1, ch. 30, § 23. And see *ante*, Vol. 2, § 97 ; 1 Russ. on Crimes, 755. One servant has no right to beat another servant, and if an under servant misconducts himself, an upper servant is not justified in striking him. Regina *v.* Huntley, 3 C. & K. 142.

[8] Turner's case, 1 Ware, 83 ; Bangs *v.* Little, Id. 506 ; Hannen *v.* Edes, 15 Mass. 347 ; Sampson *v.* Smith, Id. 365 ; [Broughton *v.* Jackson, 11 Eng. Law & Eq. R. 386 ; Wilkes *v.* Dinsman, 7 How. (U. S.) R. 89. Where the defendant was authorized by the father of an infant to take the infant from New York, where he was staying, to Cuba, the residence of the father, and to use secrecy and despatch ; *held*, that he could not be indicted for an assault for secretly carrying off the child, no undue violence having been used. Hernandez *v.* Carnobeli, 4 Duer, 642.]

order to strike, or the danger of any other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow and disabling the assailant.[1] But here, also, the opposing force or measure of defence must not be unreasonably disproportionate to the exigency of the case; for it is not every assault that will justify every battery. Therefore, if A. strikes B., this will not justify B. in drawing his sword and cutting off A.'s hand.[2] But where, upon an assault by A., a scuffle ensued, in the midst and heat of which A.'s finger was bitten off by B., the latter was held justified.[3] If the violence used is greater than was necessary to repel the assault, the party is himself guilty.[4]

§ 65. In *justification* of an assault and battery it is also competent for the defendant to prove that it was done to prevent a breach of the peace, suppress a riot, or prevent the commission of a felony;[5] to defend the possession of one's house, lands, or goods;[6] to execute process;[7] or, to defend the person of one's wife, husband, parent, child, master, or servant.[8] But in all these cases, as we

[1] Bull. N. P. 18; Weaver *v.* Bush, 8 T. R. 78; Anon. 2 Lewin, C. C. 48; 1 Russ. on Crimes, 756; The State *v.* Briggs, 3 Ired. 357.

[2] Cook *v.* Beal, 1 Ld. Raym. 177; Bull. N. P. 18.

[3] Cockcroft *v.* Smith, 1 Ld. Raym. 177, per Holt, C. J.; 11 Mod. 43; 2 Salk. 642, S. C., cited and expounded by Savage, C. J., in Elliott *v.* Brown, 2 Wend. 499.

[4] Regina *v.* Mabel, 9 C. & P. 474. And see Rex *v.* Whalley, 7 C. & P. 245. The law on this point was thus stated by Coleridge, J.: "If one man strikes another a blow, that other has a right to defend himself, and to strike a blow in his defence; but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and a battery. It is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself." Regina *v.* Driscoll, Car. & Marshm. 214. See also The State *v.* Wood, 1 Bay, 351; Hannen *v.* Edes, 15 Mass. 347; Sampson *v.* Smith, Id. 365; The State *v.* Lazarus, 1 Rep. Const. C. 34; The State *v.* Quin, 2 Const. Rep. 694; 3 Brev. 515, S. C.; [Bartlett *v.* Churchill, 24 Vt. 218; Scribner *v.* Beach, 4 Denio, 448; Brown *v.* Gordon, 1 Gray, 182.]

[5] 1 Hawk. P. C. ch. 60, § 23; 1 Russ. on Crimes, 755–757; Bull. N. P. 18.

[6] Ibid.; Green *v.* Goddard, 2 Salk. 641; Weaver *v.* Bush, 8 T. R. 78; Simpson *v.* Morris, 4 Taunt. 821; [State *v.* Hooker, 17 Vt. 658.] And see *ante*, Vol. 2, § 98; 2 Roll. Abr. 548, 549. In Massachusetts, it has been recently held, that one tenant in common of a barn-floor has no right to use force and violence to prevent his cotenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the owner then standing on the floor; and such declared purpose affords no justification of the assault. Commonwealth *v.* Lakeman, 4 Cush. 597. [* The owner of personal property is not justified in assaulting and obstructing an officer who attempts in good faith to attach the same upon a process against a third person, although such assault and obstruction be necessary to protect the property from being taken by the officer. State *v.* Richardson, 38 N. H. 208.]

[7] 2 Roll. Abr. 546; 1 Russ. on Crimes, 757; Harrison *v.* Hodgson, 10 B. & C. 445.

[8] 3 Bl. Comm. 3; 1 Russ. on Crimes, 756; 1 Hawk. P. C. *supra*. It has sometimes been held, that a master could not justify an assault in defence of his servant; because, having an interest in his service, he might have his remedy by a civil action. But it was otherwise held at a very early period, 19 H. 6, 31 b.; 2 Roll. Abr. 546; and it seems now the better opinion, that the obligation of protection and defence is mutual, between master and servant. 1

have seen in others, no more force is to be used than is necessary to prevent the violence impending ;[1] nor is any force to be applied in the defence of the possession of property until the trespasser has been warned to desist, or requested to depart, except in cases of violent entry or taking by a trespasser, or the like ;[2] for otherwise the party interfering to prevent wrong will himself be guilty of an assault.

Russ. on Crimes, *supra,* cites Tickell *v.* Read, Lofft, 215.

[1] [People *v.* Gulick, Hill & Den. 229 ; Brown *v.* Gordon, 1 Gray, 182 ; Commonwealth *v.* Ford, 5 Id. 475 ; Commonwealth *v.* Cooley, 6 Id. 350 ; State *v.* Hooker, 17 Vt. 658.]

[2] Russ. on Crimes, 757 ; *Ante,* Vol. 2, § 98 ; Mead's case, 1 Lewin, C. C. 185 ; Tullay *v.* Reed, 1 C. & P. 6 ; Commonwealth *v.* Clark, 2 Met. 23 ; Imason *v* Cope, 5 C. & P. 193

# BARRATRY.

[* § 66. Barratry defined. Indictment charges accused generally.
67. Proof of commission of three acts necessary to maintain indictment.]

§ 66. A BARRATOR is a common mover, exciter, or maintainer of suits or quarrels, in courts or in the country. The indictment charges the accused, in general terms, with being a common barrator, without specifying any particular facts or instances; but the court will not suffer the trial to proceed unless the prosecutor has seasonably, if requested, given the accused a note of the particular acts of barratry intended to be proved against him;[1] and to these alone the proof must be confined.[2]

[1] Rex *v.* Wylie, 1 New Rep. 95, per Heath, J.; Commonwealth *v.* Davis, 11 Pick. 432.

[2] Goddard *v.* Smith, 6 Mod. 262; 1 Russ. on Crimes, 184. "It is now a general rule," said Merrick, J., in Commonwealth *v.* Giles, 1 Gray, 469, "perfectly well established, that in all legal proceedings, civil and criminal, bills of particulars or specifications of facts may and will be ordered by the Court whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done. Whether such an order shall be made is a question within the discretion of the Court where the cause in which it is asked for is pending, to be judged of and determined upon the peculiar facts and circumstances attending it. We are inclined to think that such a determination is final in the Court where it is made, and is not open to re-examination or revision. But whether this be so or not, when it is once made, it concludes the rights of all parties who are to be affected by it; and he, who has furnished a bill of particulars under it, must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration. Commonwealth *v.* Snelling, 15 Pick. 321."

The indictment for this offence is as follows: —

The Jurors (&c.), upon their oath present, That ———, of ———, in the county of ———, on ———, and on divers other days and times, as well before as afterwards, was, and yet is, a common barrator, and that he the said ———, on the said ——— day of ———, and on divers other days and times, as well before as afterwards, at ——— aforesaid, in the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of said (State) then and there did move, procure, stir up, and excite, against the peace of the (State) aforesaid.

The following precedent is taken from Train and Heard's Precedents of Indictments, p. 58: —

*Indictment for being a Common Barrator.*

The Jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborers, on the first day of June, in the year of our Lord ———, at B., in the county of S., and on divers other days and times between that day and the day of the finding of this indictment, at B. aforesaid, in the county aforesaid, divers quarrels, strifes, suits, and controversies among the honest and peaceable citizens of said Commonwealth then and there on the days and times aforesaid, did move, procure, stir up, and excite. And so the Jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., at B. aforesaid, in the county

§ 67. The offence is *proved* by evidence of the moving, exciting, and prosecuting of suits in which the party has no interest, or of false suits of his own, if designed to oppress the defendants; or, of the spreading of false rumors and calumnies, whereby discord and disquiet are spread among neighbors.[1] But proof of the commission of three such acts, at least, is necessary to maintain the indictment.[2] The bringing of an action in the name of a fictitious plaintiff is a misdemeanor;[3] but it does not amount to barratry unless it be thrice repeated.

aforesaid, on said days and times was and still is a common barrator; to the common nuisance, etc., and against the peace, etc.

The words "common barrator" are indispensably necessary to be used in an indictment for this crime. 2 Saund. 308, n. (1); Rex *v.* Hardwicke, 1 Sid. 282; Reg. *v.* Hannon, 6 Mod. 311; 2 Chitty, Crim. Law, 232.

[1] 1 Inst. 368 a; 1 Hawk. P. C. ch. 81. For a copious description of this offence, see the case of Barrators, 8 Rep. 36.

[2] Commonwealth *v.* Davis, 11 Pick. 432, 435. In Commonwealth *v.* McCulloch, 15 Mass. 227, the defendant was held not to be guilty of barratry, because there was no oppression in bringing three writs before a Justice of the Peace, instead of one in the Court of Common Pleas, the costs of the three not being more than those of the one. [See Briggs *v.* Raymond, 11 Cush. 274.]

[3] 4 Bl. Comm. 134; 1 Russ. on Crimes, 185.

## BLASPHEMY.

[* § 68. All writings against any essential part of the Christian religion, with malicious design to calumniate, blasphemous.
69. Statutes against this offence have not always abrogated common law.
70. Intent of defendant to be collected by jury from circumstances of the case.]

§ 68. This crime, in a general sense, has been said to consist in speaking evil of the Deity, with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God.[1] Its mischief consists in weakening the sanctions and destroying the foundations of the Christian religion, which is part of the common law of the land, and thus weakening the obligations of oaths and the bonds of society. Hence, all contumelious reproaches of our Saviour Jesus Christ,[2] all profane scoffing at the Holy Bible, or exposing any part thereof to contempt and ridicule,[3] and all writings against the whole or any essential part of the Christian religion, striking at the root thereof, not in the way of honest discussion and for the discovery of truth, but with the malicious design to calumniate, vilify, and disparage it, are regarded by the common law as blasphemous, and punished accordingly.[4]

[1] Commonwealth *v.* Kneeland, 20 Pick. 213, per Shaw, C. J. For other and more particular descriptions of this offence, see 4 Bl. Comm. 59. The People *v.* Ruggles, 8 Johns. 293, per Kent, C. J.; 2 Stark. on Slander, p. 129–151.

[2] The State *v.* Chandler, 2 Harringt. (Del.) 553; Andrew *v.* New York Bible Society, 4 Sandf. 156; Rex *v.* Woolston, 2 Stra. 834, more fully reported in Fitzg. 64; Rex *v.* Waddington, 1 B. & C. 26; The People *v.* Ruggles, 8 Johns. 290; 1 Russ. on Crimes, 230; Rex *v.* Taylor, 1 Vent. 293.

[3] Updegraph *v.* The Commonwealth, 11 S. & R. 394; 1 Russ. on Crimes, 230; 2 Stark. on Slander, p. 138–143; Commonwealth *v.* Kneeland, 20 Pick. 206, 224, 225.

[4] Updegraph *v.* The Commonwealth, 11 S. & R. 394; Rex *v.* Carlisle, 3 B. & Ald. 161; 2 Stark. on Slander, p. 144–147; Commonwealth *v.* Kneeland, 20 Pick. 220, 224, 225; The People *v.* Ruggles, *supra*. The indictment for *verbal blasphemy* may be thus: —

The Jurors (&c.), on their oath present, that ———, of ———, in the county of ———, intending the holy name of God, [and the person and character of our Lord and Saviour Jesus Christ,] to dishonor and blaspheme, and to scandalize and vilify the [Holy Scriptures and the] Christian religion, and to bring [them] into disbelief and contempt, on ———, at ———, in the county aforesaid, did, * wilfully, maliciously, and blasphemously, with a loud voice, utter and publish in the presence

§ 69. In most of the United States statutes have been enacted against this offence; but these statutes are not understood in all cases to have abrogated the common law; the rule being, that where the statute does not vary the class and character of an offence, as, for example, by raising what was a misdemeanor into a felony, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative, and the common law is not taken away.[1]

§ 70. The *proof* of the indictment for this crime will consist of evidence showing that the defendant uttered or published the words charged, and with the malicious and evil intent alleged. The intent is to be collected by the Jury from all the circumstances of the case.[2]

and hearing of divers good citizens of this (State) the following false, profane, scandalous, and blasphemous words, to wit: [*here state the words, verbatim, with proper inuendoes, if the case requires it;*] * in contempt of the Christian religion and of good morals and government, in evil example to others, and against the peace of the (State) aforesaid.

The indictment for publishing a blasphemous libel omits the words between the two asterisks in the above precedent, and in their place charges as follows: —

——— unlawfully and wickedly print and publish, and cause to be printed and published, a false, scandalous and blasphemous libel of and concerning the Christian religion, containing therein, among other things, divers scandalous and blasphemous matters, of and concerning the Christian religion, according to the tenor following, to wit: [*here set forth the libel in hæc verba, with proper inuendoes*], in contempt [&c., as above].

[1] Commonwealth *v.* Ayer, 3 Cush. 150; Rex *v.* Carlisle, 3 B. & Ald. 161, per Bayley, J.; Rex *v.* Robinson, 2 Burr. 803, per Ld. Mansfield. And see Rex *v.* Waddington, 1 B. & C. 26.

[2] [* The prisoner's mere confession that he used the words charged will not authorize a conviction for blasphemy. The prosecutor must show that an offence was committed, and some one must have heard the words. Drunkenness is no excuse, and only aggravates the offence. People *v.* Porter, 2 Parker, C. R. (N. Y.) 14.] See further, *infra*, tit. LIBEL.

William C. Hazledine, Albuquerque, N. M.

# BRIBERY.[1]

[* § 71. Bribery may be committed by any person in official station using power of his place for reward; and by any person giving or offering rewards for public office.

72. Offer of bribe completes offence so far as person offering is concerned.

73. What constitutes giving money.]

§ 71. BRIBERY is generally *defined* to be the receiving or offering of any undue reward by or to any person whose ordinary pro-

[1] The indictment for bribing, or attempting to bribe a Judge, may be thus:

The Jurors (&c.), on their oath present, that A. B., of ———, on ———, at ———, within the county aforesaid, did unlawfully, wickedly, and corruptly give *or* offer to give), to one C. D. of ———, he the said C. D. being then and there a Judge (*or*, one of the Justices) of the (*here insert the style of the Court*), duly and legally appointed and qualified to discharge the duties of that office, the sum of ——— dollars, as a bribe, present, and reward, to obtain the opinion, judgment, and decree of him the said C. D. in a certain suit (controversy *or* cause) then and there depending before him the said C. D. as Judge as aforesaid (and others the associate Justices of said Court), to wit: (*here state the nature of the suit or proceeding*), the said office of Judge (*or* Justice) being then and there an office of trust concerning the administration of justice within the said (United States *or* State *or* Commonwealth), against the peace, &c.

This precedent was drawn upon the statute of the United States, of April 30, 1790, § 21, Vol. 1, p. 117, Peters's ed. (see Davis's Preced. p. 79), but is conceived to be equally good, being varied as above, in a prosecution at common law.

The following precedent is taken from Train and Heard's Precedents of Indictments, p. 62: —

*Indictment for attempting to Bribe a Constable.*

The Jurors, etc., upon their oath present, that on the first day of June, in the year of our Lord ———, at B., in the county of S., one A. C., Esquire, then and yet being one of the Justices of the Peace within and for the said county of S., duly qualified to discharge and perform the duties of said office, did then and there under a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to J. N., thereby commanding them, upon sight thereof, to take and bring before the said A. C., so being such Justice as aforesaid, or some other Justice of the Peace within and for the said county of S., the body of D. F., late of B. aforesaid, in the county aforesaid, to answer, *etc. etc. as in the warrant;* and which said warrant afterwards, to wit, on the day and year aforesaid, at B. aforesaid, in the county aforesaid, was delivered to the said J. N., then being one of the constables of said B., to be executed in due form of law. And the Jurors aforesaid, upon their oath aforesaid, do further present, that J. S., well knowing the premises, afterwards, to wit, on the day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, wickedly and corruptly did offer unto the said J. N., so being constable as aforesaid, and then and there having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of fifty dollars, if the said J. N. would refrain from executing the said warrant, and from taking and arresting the said D. F. under and by virtue of the same, for and during fourteen days from that time, that is to say, from the time the said J. S. so offered the said sum of fifty dollars to the said J. N.

fession or business relates to the administration of public justice, in order to influence his behavior in office and incline him to act contrary to the known rules of honesty and integrity.[1] But it is also taken in a larger sense, and may be committed by any person in an official situation, who shall corruptly use the power and interest of his place for rewards or promises ; and by any person who shall give or offer or take a reward for offices of a public nature ; or shall be guilty of corruptly giving or promising rewards, in order to procure votes in the election of public officers.[2] Thus it has been held bribery by the common law for a clerk to the agent for prisoners of war to take money in order to procure the exchange of some of them out of their turn ; [3] or, for one to offer to a cabinet minister a sum of money to procure from the crown an appointment to a public office ; [4] or, corruptly to solicit an officer of the customs, whose duty it was to seize forfeited goods, to forbear from seizing them ; [5] or, to promise money to a voter for his vote in favor of a particular ticket or interest in the election of city officers,[6] or members of parliament.[7]

§ 72. The misdemeanor is complete by the *offer of the bribe*, so far as the offer is concerned. If the offer is accepted, both parties are guilty. And though the person bribed does not perform his promise, but directly violates it, as, for example, if, in the case of an election, he votes for the opposing candidate or interest, the offence of the corruptor is still complete.[8] So, though the party never intended to vote according to his promise, yet the offerer is guilty.[9]

§ 73. If it be alleged, in an indictment for corrupting a voter, that he had a *right to vote*, this allegation will be sufficiently proved

as aforesaid. And so the Jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. on the first day of June in the year aforesaid, at B. aforesaid, in the county aforesaid, in manner and form aforesaid, did unlawfully attempt and endeavor to bribe the said J. N., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said D. F. under and by virtue of the warrant aforesaid; against the peace, etc.

[1] 3 Inst. 145 ; 1 Russ. on Crimes, 154 ; 4 Bl. Comm. 139 ; 1 Hawk. P. C. ch. 67.

[2] Ibid.

[3] Rex *v.* Beale, cited 1 East, 183.

[4] Rex *v.* Vaughan, 4 Burr. 2494 ; Stockwell *v.* North, Noy, 102 ; Moor, 781, S. C. So, where several persons mutually agreed to procure for another an appointment to a public office, for a sum of money, to be divided among them, it was held a misdemeanor at common law. Rex *v.* Pollman et al. 2 Campb. 229.

[5] Rex *v.* Everett, 3 B. & C. 114.

[6] Rex *v.* Plympton, 2 Ld. Raym. 1377.

[7] Rex *v.* Pitt, 3 Burr. 1335, 1338.

[8] Sulston *v.* Norton, 3 Burr. 1235 ; Harding *v.* Stokes, 2 M. & W. 233 ; Henslow *v.* Fawcett, 3 Ad. & El. 51. The last two cases were actions upon the statute ; but the doctrine is that of the common law.

[9] Henslow *v.* Fawcett, *supra*, per Patterson, J., and Coleridge, J.

by evidence that he actually did vote, without challenge or objection.[1] The allegation of the payment of money to that voter, may be proved by evidence that it was under color of a loan, for which his note was taken, if it were at the same time agreed that it should be given up, after he had voted.[2] So, if the corruptor's own note were given for the money.[3] So, if the transaction were in the form of a wager or bet with the voter, that he would not vote for the offerer's candidate or ticket.[4] So, if the voter received from the offerer a card, or token, in one room, which he presented to another person in another room, and thereupon received the money, it is evidence of the payment of money by the former.[5]

[1] Rigg *v.* Curgenven, 2 Wils. 395; Comb *v.* Pitt, cited Ibid. 398.

[2] Sulston *v.* Norton, 3 Burr. 1235.

[3] Ibid.

[4] 1 Hawk. P. C. ch. 67, § 10 (*n*), cites Lofft, 552.

[5] Webb *v.* Smith, 4 Bing. N. C. 373. [Under the Stats. 17 & 18 Vict. c. 102, making it indictable "to promise money to a voter in order to induce him to vote," a promise to a voter of his travelling expenses on condition that he will come and vote for the promisor, is criminal; but such a promise without such condition is not. Cooper *v.* Slade, 36 Eng. Law & Eq. R. 152.]

[* The offer to furnish land, buildings, &c., or to build a bridge between two towns, or the gift by individuals of their promissory notes to the county school company as an inducement to the voters to vote in favor of a removal of the county seat, is not bribery within the meaning of the Iowa Code. Dishon *v.* Smith, 10 Iowa, 212.

It is suggested, in the foregoing case, that the offer must be intended to affect the performance of a legal duty and not a mere moral duty.]

# BURGLARY.[1]

[* § 74. Burglary defined.
75. Not essential that breaking and entering both be done same night.
76. Breaking may be actual or constructive.
77. Constructive breaking when admission is obtained by threat or fraud.
78. Actual entry necessary, but need not be entry of person.
79. Building entered must be dwelling-house and inhabited.
80. Dwelling-house comprehends all out-buildings which are *parcel thereof*, though not contiguous to it.
81. Felonious breaking and entering room of a lodger having no separate outer entrance is burglary in house of general owner.
82. Felony actually committed, proof of intent. Felony by statute, sufficient.
83. Time of breaking may be inferred from circumstances of case.]

§ 74. This offence is usually defined in the words of Lord Coke, who says that a burglar is "he that, by *night*, *breaketh* and *entereth* into a *mansion-house*, with *intent* to commit a *felony*."[2] Evidence of all these particulars is therefore necessary, in order to maintain the indictment.

§ 75. In regard to the *time*, the malignity of the offence consists in its being done in the *night*, when sleep has disarmed the owner, and rendered his castle defenceless. And it is night, in the sense of the law, when there is not *daylight* [*crepusculum* or *diluculum*]

[1] The form of an indictment for burglary, at common law, is as follows: —

The Jurors (&c.) upon their oath present, that (*naming the prisoner*) late of ——, on ——, about the hour of ——, in the night of the same day, with force and arms, at ——, in the county aforesaid, the dwelling-house of one —— (*naming the occupant*), there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said (*occupant*) in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away; [*if goods were actually stolen, add as follows:* — and one (*here describe the goods, alleging the value of each article*), of the value of —— dollars, of the goods and chattels of the said (*occupant*) in the dwelling-house aforesaid then and there being found, then and there in the same dwelling-house feloniously and burglariously did steal, take, and carry away; [against the peace of the State (*or* Commonwealth) aforesaid. [* The indictment must state the value of the goods stolen, to show whether a felony, — an essential ingredient of burglary, — was or not committed. People *v.* Murray, 8 Cal. 519.]

[2] 3 Inst. 63; 1 Russ. on Crimes, 785. Wilmot (Digest of the Law of Burglary, p. 3) defines this crime as follows: A burglar, at common law, is he that by night feloniously breaketh and entereth into the dwelling-house of another. Therefore, the breaking and entering a dwelling-house, with intent to cut off an ear of an inhabitant, is not a felony. Commonwealth *v.* Newell, 7 Mass. 247; nor a breaking and entering with intent to commit adultery. The State *v.* Cooper, 16 Verm. 551.

enough left or begun, to discern a man's face withal.[1] The light of the moon has no relation to the crime.[2] Both the breaking and entering must be done in the night-time; but it is not essential that both be done in the same night.[3]

§ 76. The *breaking* of the house may be *actual*, by the application of physical force; or constructive, where an entrance is obtained by fraud, threats, or conspiracy. An *actual breaking* may be by lifting a latch; making a hole in the wall;[4] descending the chimney;[5] picking, turning back, or opening the lock, with a false key or other instrument;[6] removing or breaking a pane of glass, and inserting the hand or even a finger;[7] pulling up or down an unfastened sash;[8] removing the fastening of a window, by inserting the hand through a broken pane;[9] pushing open a window

[1] [See Commonwealth *v.* Williams, 2 Cush. 582. In Massachusetts, by Stat. 1847, ch. 13, the night-time is declared to be, in all criminal cases, the time between one hour after sunset and one hour before sunrise.]

[2] 4 Bl. Comm. 224; 1 Hale, P. C. 550, 551; Commonwealth *v.* Chevalier, 7 Dane's Abr. 134; 1 Gabbett, Crim. Law, 169; The State *v.* Bancroft, 10 N. Hamp. 105.

[3] 1 Hale, P. C. 551; 1 Russ. on Crimes, 797; 1 Gabbett, Crim. Law 176, 177; Rex *v.* Smith, Russ. & Ry. 417. The breaking at a different period from the entering must clearly show an intent to commit felony. And a party present at the breaking on the first night, but not present at the entering, on the second, is still guilty of the whole offence. Rex *v.* Jordan, 7 C. & P. 432. "I should submit," says Wilmot (Dig. of the Law of Burglary, p. 9), "that a case might exist, where such a principle would work great injustice. Suppose thieves to break together, and be disturbed, or find a formidable resistance likely to be made, and separate, leaving the burglary incomplete, and without any intention of resuming operations, and the next night some of the party, unknown to the rest, make an entry, this would be repugnant to the constituents of burglary, which require that there should be both a breaking and entering, and that one without the other renders the offence incomplete. Besides, in such a case, there would be no *locus panitiæ*, which the indulgence of our law allows even in the worst offences. Again, suppose A. and B. break a dwelling-house on a certain night, intending on the following night to enter; A. enters alone, and unknown to B., in the same night, hoping thereby to gain a greater share of the plunder, how would B. be *particeps criminis* to that act of A.? Or suppose that A. and B. break a dwelling-house on a certain night, intending on the following night to enter. On the following night B. alone enters, and being resisted commits murder, would A. be *particeps criminis* in the murder? On the whole, it is submitted, that this is a question deserving of further consideration." [* It must be proved directly or indirectly that the offence was committed in the night. State *v.* Whit, 4 Jones Law (N. C.) 349.]

[4] 1 Hale, P. C. 559; 2 East, P. C. 488. See 1 Gabbett, Crim. Law, 169–172; The State *v.* Wilson, Coxe, 439; Rex *v.* Jordan, 7 C. & P. 432.

[5] Rex *v.* Brice, Russ. & Ry. 450. [* An entry, at night, through a chimney, into a log-cabin, in which the prosecutrix dwells, and stealing goods therein, will constitute burglary, although the chimney, made of logs and sticks, may be in a state of decay, and not more than five and a half feet high (Pearson, C. J., dissenting). State *v.* Willis, 7 Jones Law (N. C.) 190.]

[6] 1 Hale, P. C. 552; 1 Russ. on Crimes, 786. And see Pugh *v.* Griffith, 7 Ad. & El. 827.

[7] Rex *v.* Davis, Russ. & Ry. 499; Rex *v.* Perkes, 1 C. & P. 300; Regina *v.* Bird, 9 C. & P. 44. So putting the head out of the skylight, is a sufficient breaking out. Rex *v.* M'Kearney, Jebb, 99.

[8] Rex *v.* Haines, Russ. & Ry. 451; Rex & Hyams, 7 C. & P. 441. So is cutting and tearing down a netting of twine, nailed over an open window. Commonwealth *v.* Stephenson, 8 Pick. 354. See Hunter *v.* The Commonwealth, 7 Gratt. 641.

[9] Rex *v.* Robinson, 1 Moody, C. C. 327. And see Rex *v.* Bailey, Russ. & Ry. 341.

which moved on hinges and was fastened by a wedge;[1] breaking and opening an inner door, after having entered through an open door or window;[2] or other like acts; and even by escaping from a house, by any of these or the like means, or by unlocking the hall door, after having committed a felony in the house, though the offender were a lodger.[3] Whether it would be burglary, in a guest at an inn, to open his own chamber door with a felonious intent, is greatly doubted.[4] The breaking must also be into some apartment of the house, and not into a cupboard, press, locker, or the like receptacle, notwithstanding these, as between the heir and executor, are regarded as fixtures.[5] It must also appear that the place through which the thief entered was closed; for if he entered through a door or window left open by the carelessness of the occupant, it is not burglary.[6]

§ 77. The offence of breaking the house is also *constructively* committed, when admission is obtained by threats, or by fraud; as, if the owner is compelled to open the door by fear, or opens it to repel an attack, and thieves rush in;[7] or, if they raise a hue and cry, and rush in when the constable opens the door;[8] or, if entrance is obtained by legal process fraudulently obtained;[9] or, under pretence of taking lodgings;[10] or, if lodgings be actually

Breaking open a shutter-box adjoining the window was held no burglary. Rex *v.* Paine, 7 C. & P. 135.

[1] Rex *v.* Hall, Russ. & Ry. 355.

[2] Rex *v.* Johnson, 2 East, P. C. 488.

[3] Regina *v.* Wheeldon, 8 C. & P. 747; Rex *v.* Lawrence, 4 C. & P. 231. Whether raising a trap, or flap-door, which is kept down by its own weight, is a sufficient breaking of the house, is a question upon which there has been some diversity of opinion. See 1 Russ. on Crimes, 790; 1 Hale, P. C. 554. In Rex *v.* Brown, 2 East, P. C. 487, in 1790, Buller, J., held that it was. In Rex *v.* Callan, Russ. & Ry. 157, in 1809, the point was reserved for the consideration of the twelve Judges, and they were equally divided upon it. And in 1830, in Rex *v.* Lawrence, 4 C. & P. 231, it was held by Bolland, B., to be not sufficient. In this last case, that of Rex *v.* Brown was referred to. Rex *v.* Lawrence seems to have been overruled by Rex *v.* Russell, 1 Moody, C. C. 377, where it was held that lifting up the flap of a cellar, which was kept down by its own weight, is a sufficient breaking, although such flap may have been occasionally fastened by nails, but was not so fastened at the time the entry was made. Removing loose planks in a partition wall, they not being fixed to the freehold, has been held not a breaking. Commonwealth *v.* Trimmer, 1 Mass. 476.

[4] 2 East, P. C. 488; 1 Hale, P. C. 554.

[5] Foster, 109; 2 East, P. C. 489. This point seems never to have been solemnly decided. Wilmot suggests as a reason why such a breaking should not be burglarious, that, as a general principle, the actual breaking of the dwelling-house has reference to the entry at common law, and to the escape of the intruder by breaking out under the statute. Whereas the breaking of a cupboard is a distinct and independent act. This question is fully discussed in Wilmot, Dig. of the Law of Burglary, p. 30–35. And see The State *v.* Wilson, Coxe, 439, 441.

[6] 3 Inst. 64; 1 Hale, P. C. 551, 552; The State *v.* Wilson, Coxe, 439; 1 Russ. on Crimes, 786; Rex *v.* Lewis, 2 C. & P. 628; Rex *v.* Spriggs, 1 M. & Rob. 357; The State *v.* Boon, 13 Ired. 244.

[7] 2 East, P. C. 486. See the State *v.* Henry, 9 Ired. 463.

[8] Ibid. 485.

[9] Rex *v.* Farr, J. Kelyng, R. 43; 2 East, P. C. 485; 1 Russ. on Crimes, 793.

[10] Ibid.

taken, with an ultimate felonious intent;[1] or, if the entrance is effected by any other fraudulent artifice; or, if the house be opened by the servants within, by conspiracy with those who enter.[2]

§ 78. There must be some proof of actual *entry* into the house; but it is not always necessary to show an entrance of the person; for if the intent be to commit a felony in the stealing of goods in the house, the insertion of any instrument for that purpose, through the broken aperture, will be sufficient to complete the offence. But if the instrument were inserted, not for the purpose of abstracting the goods, but for the purpose of completing the breaking and thereby effecting an entrance to commit the intended felony, it is not sufficient. Thus, to break the window or door, and thrust in a hook to steal, or weapon to rob or kill, is burglary, though the hand of the felon be not within the house; but to thrust an auger through, in the act of effecting an entrance by boring, does not amount to burglary.[3] So, if, after breaking the house, the thief sends in a child of tender age to bring out the goods, he is guilty of burglary.[4]

§ 79. The building into which the entry is made must be proved to be a *mansion* or *dwelling-house*,[5] for the habitation of

[1] Ibid.

[2] 2 East, P. C. 486. And it is burglary in both. Rex *v.* Cornwell, Id. 2 Stra. 881, S. C.; 1 Russ. on Crimes, 794; 1 Gabbett, Crim. Law, 173; Regina *v.* Johnson, 1 Car. & Marshm. 218. But if the servant is faithful, and intended only to entrap the thief, it is not a burglarious entry. Ibid.

[3] 2 East, P. C. 490; Rex *v.* Hughes, 1 Leach, C. C. (4th ed.) 406; Rex *v.* Rust, 1 Moody, C. C. 183. Whether the act of discharging a bullet into the house, with intent to kill, is a burglarious entry into the house, is doubted. Lord Hale thought it was not. 1 Hale, P. C. 555. Serjeant Hawkins states it as an example of a constructive entry. 1 Hawk. P. C. ch. 38, § 11. And Mr. East thinks it difficult to distinguish between this case and that of an instrument thrust through a window for the purpose of committing a felony, unless it be that the one instrument is held in the hand at the time, and the other is discharged from it. 2 East, P. C. 490. See 1 Gabbett, Crim. Law, 174, 175, where this difference is said to be material. There is a distinction between the two cases. It is submitted says Wilmot (Dig. of Law of Burglary, 58), that the only possible way in which the discharging a loaded gun or pistol into the dwelling-house from the outside, could be held burglary, would be by laying the intent to commit felony by killing or wounding, or generally, to commit felony; and *quære*, whether the breaking and entry requisite to complete the burglary would be satisfied by such discharge?

[4] 1 Hale, P. C. 555, 556.

[5] Burglary may be committed in a church at common law. Regina *v.* Baker, 3 Cox, C. C. 581 (1849). In this case, Alderson, B., said, I take it to be settled law that burglary may be committed in a church, at common law, and so held lately, on circuit. An indictment for burglary in a church need not lay the offence as committed in a dwelling-house; it should charge that the defendant feloniously and burglariously broke and entered the parish church of the parish to which it belongs, with intent, &c., according to the circumstance of the case. 2 East, P. C. 512; Wilmot, Dig. of the Law of Burglary, 198. In some of the United States, the offence is now punished by statute, which makes it a distinct felony to break and enter any church or chapel, and steal any chattel therein. But in Regina *v.* Baker, *supra*, Alderson, B., ruled that the acts of Parliament which particularly relate to offences respecting churches, do not destroy the offence at common law.

man, and actually inhabited, at the time of the offence. It is not necessary, however, that the inhabitants be within the house at the moment; for burglary may be committed while all the family are absent for a night or more, if it be *animo revertendi*.[1] But if the owner or his family resort to the house only in the daytime, or if he employ persons only to sleep there, who are not of his family nor in his domestic service and employment, though it be to protect the property from thieves, this is not sufficient proof of habitancy by the owner.[2] Nor does habitancy commence with the putting of *furniture* into the house, before the actual residence there of the owner or his family.[3] Neither will the casual occupancy of a tenement as a lodging-place suffice of itself to constitute it a dwelling-house; as, if a servant be sent to lodge in a *barn*, or a porter to lodge in a *warehouse*, for the purpose of watching for thieves.[4] But the actual occupancy of the owner will not alone constitute the place his dwelling-house, unless it is a permanent and substantial edifice; and therefore to break open a tent or booth, erected in a fair or market, though the owner sleep in it, is not burglary.[5]

§ 80. The term "mansion," or "dwelling-house," comprehends all the outbuildings which are *parcel thereof*, though they be not contiguous to it. All buildings within the same curtilage or common fence, and used by the same family, are considered by the law as parcel of the mansion. If they are separated from the dwelling-house, and are not within the same common fence, though occupied by the same owner, the question, whether they are parcel of the mansion or not, is a question for the Jury, upon the evidence.[6] And here it becomes material to inquire whether

[1] Hale, P. C. 556; 4 Bl. Comm. 225; 1 Gabbett, Crim. Law, 181, 182; [Commonwealth *v.* Barney, 10 Cush. 479.] Breaking a house in town, which was shut up, while the family were spending the summer in the country, has been held burglary. Commonwealth *v.* Brown, 3 Rawle, 207.

[2] Ibid.; 2 East, P. C. 497, 498, 499; Rex *v.* Flannagan, Russ. & Ry. 187; Rex *v.* Lyons, 1 Leach, C. C. (4th ed.) 185; Rex *v.* Fuller, Id. 222, n.; 1 Russ. on Crimes, 797 – 800.

[3] Rex *v.* Lyons, 1 Leach, C. C. (4th ed.) 185; 2 East, P. C. 497, 498; Rex *v.* Thompson, 1 Leach, C. C. (4th ed.) 771; 1 Gabbett, Crim. Law, 480. But see *contra* Commonwealth *v.* Brown, 3 Rawle, 207.

[4] Rex *v.* Smith, 2 East, P. C. 497; Rex *v.* Brown, Id. 493, 497, 501.

[5] 1 Hale, P. C. 557; 4 Bl. Comm. 226.

[6] 1 Hale, P. C. 558, 569; 3 Inst. 64; 1 Hawk. P. C. ch. 38, § 21 – 25; 1 Gabbett, Crim. Law, 178; 2 East, P. C. 492 – 495; Devoe *v.* The Commonwealth, 3 Met. 325; 1 Russ. on Crimes, 800 – 802; Parker's case, 4 Johns. 424; The State *v.* Ginns, 1 Nott & M'C. 583; The State *v.* Langford, 1 Dev. 253; The State *v.* Wilson, 1 Hayw. 242; The State *v.* Twitty, Ib. 102; Rex *v.* Westwood, Russ. & Ry. 495; Rex *v.* Chalking, Ib. 334. Thus, an out-house, within an enclosed yard, had been held part of the dwelling-house of the occupying owner, though he has another tenement opening into the same yard, in the occupancy of a tenant having an ease-

the apartment or building which was broken had a separate door of entrance of its own, or was approachable only through the common door of the dwelling-house. For if the owner of a dwelling-house should let part of it for a shop, and the tenant should occupy it for his trade only, without sleeping there, and it should have a door of its own, distinct from that of the dwelling-house; here, though it be under the roof of the mansion, yet it is not a place in which burglary can be committed.[1] But if there is only one common door of entrance to both, it is still part of the dwelling-house of the owner of the mansion.[2]

§ 81. And in regard to the *ownership* of the dwelling-house, if the general owner of the mansion, in which he resides, should let a room in it to a lodger, who enters only by the common door, and his apartment is feloniously broken and entered, it is burglary in the house of the general owner.[3] But if the lodger's room has a separate outer entrance of its own, and no other, the room is the house of the lodger.[4] And where rooms in a house are let to several tenants, who enter by a common hall door; if the general owner does not inhabit the house, then each apartment is the separate dwelling-house of its own tenant. Such is the case of chambers in the Inns of Court, rooms in Colleges, and the like.[5] If two have the title to two contiguous dwelling-houses, in common, pay-

ment there. Rex *v.* Walters, Ry. & M. 13. So, a permanent building, used and slept in only during a fair. Rex. *v.* Smith, 1 M. & Rob. 256. So, a house occupied only by the servants of the owner, the burglary being in his shop adjoining, and communicating with the house by a trap-door and ladder. Rex *v.* Stock, Russ. & Ry. 185; 2 Taunt. 339, S. C. So, a building within the same enclosure, used with the dwelling-house, but accessible only by an open passage. Rex *v.* Hancock, Russ. & Ry. 170. Though no person sleeps in such building. Rex *v.* Gibson, 2 East, P. C. 508. Apartments let to lodgers, as tenants, are the dwelling-houses of the lodgers, if the owner do not dwell in the same house, or if the lodger has a separate entrance for himself, from the street; but if the owner, by himself or his servants, occupies a part of the same house, the whole is his dwelling-house. Rex *v.* Gibbons, Russ. & Ry. 422; Rex. *v.* Carrell, 2 East, P. C. 506; Rex *v.* Turner, Ib. 492; Rex *v.* Martin, Russ. & Ry. 108.

[1] 1 Hale, P. C. 557, 558; 4 Bl. Comm. 225; J. Kelyng, 83, 84. [But see People *v.* Snyder, 2 Parker, C. R. 23.]

[2] Rex *v.* Gibson, 1 Leach, C. C. (4th ed.) 357; 2 East, P. C. 507, 508. In the case of a large manufactory in the centre of a pile of buildings, the wings of which were inhabited, but without any communication with the manufactory in the centre, it was held, that burglary could not be committed in the latter place, though the whole pile was enclosed within a common fence. Rex *v.* Eggington, 2 East, P. C. 494. [* In People *v.* Snyder, 2 Parker, C. R. (N. Y.) 23, it was held that burglary may be committed in a shop which is under the same roof with, and nearly surrounded by, rooms occupied by the family, though there be no communication from the latter to the former, without going out of doors.]

[3] 1 Hale, P. C. 556; 4 Bl. Comm. 225; 2 East, P. C. 499, 500; Lee *v.* Gansell, Cowp. 8; J. Kel. 84.

[4] Ibid.; 1 Russ. on Crimes, 800 – 803.

[5] Ibid.; 2 East, P. C. 505; Evans *v.* Finch, Cro. Car. 473; Rex *v.* Rogers, 1 Leach, C. C. (4th ed.) 89; 2 Hale, P. C. 358; [People *v.* Bush, 3 Parker, C. R. 552.] [* Mason *v.* People, 26 N. Y. 200.]

ing rent and taxes for both out of their common fund, yet if their dwellings be separately inhabited, and one be feloniously broken and entered, it is burglary in the dwelling-house of the occupant of that one only, and not of both; but if in such case the occupancy also is joint, the entrance for both families being by the same common door, it is the dwelling-house of both.[1] In all these cases, the offence must be laid accordingly, or the variance will be fatal.

§ 82. The *felonious intent*, charged in the indictment, is sufficiently proved by evidence of a felony actually committed in the house; it being presumed that the act was done pursuant to a previous intention.[2] If none was committed, then the intent to commit the felony charged must be distinctly proved. And it is not necessary that it be a felony at common law; for if the act has been created a felony by statute, it is sufficient.[3]

§ 83. The *time of the breaking* may be inferred by the Jury from the circumstances of the case; as, for example, if the goods stolen were seen in the house after dark, and at daylight in the morning were missing.[4] And the *fact of breaking* a *closed* door may also be inferred from evidence that it was found open in the morning, and that marks of violent forcing were found upon it.[5]

[1] Rex *v.* Jones, 2 Leach, P. C. (4th ed.) 537; 2 East, P. C. 504.

[2] 1 Hale, P. C. 560. But the actual commission of felony in the house, says Wilmot, Dig. of the Law of Burglary, p. 11, is not conclusive proof that the entry was made with intent to commit that felony. Murder might ensue, where there existed only the intent to steal; or a person might open a door and enter to commit a trespass, or to recover his own property, and afterwards, on an opportunity offered, commit larceny. In the first instance, however, he who should commit murder, would not be excused on account of an entry with no such intention; for, as East says, "It is a general rule, that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence." A servant, who was intrusted by his master, sold goods, and concealed the money in the house; and after he was discharged from the service, broke the house, and took the money which he had concealed. This was holden to be no burglary, because the first taking of the money was not felony, but only a breach of trust. "Although the money was the master's in right, it was the servant's money in possession." The subsequent entry, therefore, was only a trespass. 2 East, P. C. 510; 1 Russ. by Greaves, 823; 1 Shower, 53. [* The intent with which one charged with burglary entered one store may be shown by proof tending to show a felony, committed by him, at the same time, in an adjoining store. Osborne *v.* People, 2 Parker, C. R. (N. Y.) 583.]

[3] 2 East, C. C. 511; Wilmot, Dig. of the Law of Burglary, 15. [* In New York, it is not necessary to specify in the indictment what kind of felony was intended. Mason *v.* People, 26 N. Y. Ct. Ap. 200.]

[4] The State *v.* Bancroft, 10 N. Hamp. 105.

[5] Commonwealth *v.* Merrill, Thacher's Crim. Cases, 1.

## CHEATING.

[* § 84. Offence must affect public at large and be one against which common prudence is not sufficient to guard.
85. Selling unwholesome food an illustration.
86. Cheating by using false weights or measures indictable at common law.
87. Manner of cheating must be alleged and proved.
88. Person to be defrauded must be proved, and accomplishment of design.]

§ 84. The indictment for this offence, *at common law*, must show, and of course the prosecutor must prove, *first*, that the offence was of a nature to affect not only particular individuals, but *the public at large*, and *against which common prudence and care are not sufficient to guard*.[1] Hence it was held indictable for common players to cheat with false dice;[2] and for a person to pretend to have power to discharge soldiers, thereupon taking money from them for false discharges.[3] So, obtaining an order from the court to hold to bail, by means of a false voucher of a fact, fraudulently produced for that purpose;[4] furnishing adulterated bread to the government, for the use of a military asylum;[5] and selling army-bread to the government, by false marks of the weight, fraudulently put on the barrels;[6] have been held indictable offences at common law. On the other hand, it has been held not indictable for a man to violate his contract, however fraudulently it be broken;[7] or, to obtain goods by false verbal representations of his credit in society and his ability to pay for them;[8] or, tortiously to retain possession of a chattel;[9] or, tortiously to obtain possession

[1] This was stated by Lord Mansfield as indispensably necessary to render the offence indictable. See Rex *v.* Wheatley, 2 Burr. 1125; 1 Leading Crim. Cases, 1; cited with approbation by Lord Kenyon, as establishing the true bounds between frauds which are and are not indictable at common law, in Rex *v.* Lara, 6 T. R. 565. And see 2 Chitty, Crim. Law, 994; Cross *v.* Peters, 1 Greenl. 387, per Mellen, C. J.; The People *v.* Stone, 9 Wend. 182; The State *v.* Justice, 2 Dev. 199; The State *v.* Stroll, 1 Rich. 244.

[2] Leeser's case, Cro. Jac. 497.

[3] Serlested's case, Latch, 202.

[4] Per Lord Ellenborough, in Omealy *v.* Newell, 8 East, 364, 372. [And see Regina *v.* Evans, 1 Dears. & Bell, 236.]

[5] Rex *v.* Dixon, 3 M. & S. 14.

[6] Respublica *v.* Powell, 1 Dall. 47.

[7] Commonwealth *v.* Hearsey, 1 Mass. 137.

[8] Commonwealth *v.* Warren, 6 Mass. 72.

[9] The People *v.* Miller, 14 Johns. 371.

of a receipt ;[1] or of lottery-tickets, by pretending to pay for them by drawing his check on a banker with whom he had no funds ;[2] or, to receive good barley from an individual to grind, and instead thereof to return a musty mixture of barley and oatmeal ;[3] or, fraudulently to deliver a less quantity of beer than was contracted for and represented ;[4] or, fraudulently to obtain goods on promise to send the money for them by the servant who should bring them ;[5] or, to borrow money or obtain goods in another's name, falsely pretending to have been sent by him for that purpose ;[6] or, falsely and fraudulently to warrant the soundness of a horse, or the title to land.[7]

§ 85. Under this head may be ranked the offence of selling unwholesome food, which was indictable by the common law, and by the statute of 51 Hen. 3, st. 6.[8] In such case, it is not material whether the offence be committed from malice or the desire of gain ; nor whether the offender be a public contractor or not, or the injury be done to the public service or not ; nor that he acted in violation of any duty imposed by his peculiar situation ; nor that he intended to injure the health of the particular individual for whose use the noxious articles were sold ; the essence of the offence consisting in doing an act, the probable consequences of which are injurious to the health of man.[9]

[1] The People *v.* Babcock, 7 Johns. 201.

[2] Rex *v.* Lara, 6 T. R. 565. But see *contra*, Rex *v.* Jackson, 3 Campb. 370. [This case was decided under Stat. 30, Geo. 2, against false pretences, and confirms rather than opposes Rex *v.* Lara. See Rex *v.* Wheatly, 1 Leading Crim. Cases, 12.]

[3] Rex *v.* Haynes, 4 M. & S. 214.

[4] Rex *v.* Wheatly, 2 Burr. 1125; 1 Leading Crim. Cases, 1.

[5] Rex *v.* Goodhall, Russ. & Ry. 461. And in Hartmann *v.* The Commonwealth, 5 Barr, 60, it was held, that obtaining a false credit otherwise than by false tokens, or the removal and secreting of goods with intent to defraud creditors, are not indictable at common law.

[6] Regina *v.* Jones, 1 Salk. 379; Rex *v.* Bryan, 2 Stra. 866.

[7] Rex *v.* Pywell, 4 Stark. R. 402. See also Weierbach *v.* Trone, 2 Watts & Serg. 408. See Regina *v.* Rowlands, 2 Denison, C. C. 364 ; 5 Cox, C. C. 481 ; 9 Eng. Law & Eq. Rep. 291; Regina *v.* Kenrick, 5 Q. B. 62; *Infra*, tit. CONSPIRACY, § 90 *a*. Where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, Littledale, J., held, that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as such, and the party be transported. Rex *v.* Codrington, 1 C. & P. 661. But in Regina *v* Kenrick, 5 Q. B. 49; Dav. & M. 208, that decision was much questioned; and it was strongly intimated, that the execution of a *contract* between the same parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. And in Regina *v.* Abbott, 1 Denison, C. C. 173; 2 C. & K. 630, it was decided unanimously by the Judges, upon a case reserved, that the law was so. [A false statement, that a party has a certain amount "due and owing to him," is not a false representation on which an indictment can be maintained. Regina *v.* Oates, 25 Law & Eq. R. 552.]

[8] 4 Bl. Comm. 162; 2 East, P. C. 822.

[9] Ibid.; 2 Chitty, Crim. Law, 557, n.; 3 M. & S. 16, Per Ld. Ellenborough; Rex *v.* Treeve, 2 East, P. C. 821; 1 Russ. on Crimes, 109.

§ 86. To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial. In addition to this, cheating by false "privy tokens and counterfeit letters in other men's names," was made indictable by the statute of 33 Hen. 8, ch. 1, which has been adopted and acted upon as common law in some of the United States, and its provisions are believed to have been either recognized as common law, or expressly enacted, in them all.[1] Under this statute it has been held, that the fraud must have been perpetrated by means of some token or thing visible and real, such as a ring or key, or the like; a verbal representation not being sufficient; or else by means of a writing, either in the name of another, or so framed as to afford more credit than the mere assertion of the party defrauding.[2]

§ 87. In the *second* place, the indictment must show, and the prosecutor must prove, *the manner in which the cheating was effected;* as, for example, if it were by a false token, the particular kind of token must be specified;[3] but if several tokens or means are described, it will be sufficient if any one of them be proved.[4]

§ 88. In the *third* place, it is material to specify and prove the *person* intended to be defrauded; and that the *design* was *successfully accomplished*, at least so far as to expose the person to the danger of loss.[5]

[1] Commonwealth *v.* Warren, 6 Mass. 72; The People *v.* Johnson, 12 Johns. 292.

[2] 2 East, P. C. 689; 3 Chitty, Crim. Law, 997; Rex *v.* Wilders, cited in 2 Burr. 1128, Per Ld. Mansfield. The statute of 30 Geo. 2, ch. 24, was enacted to supply the deficiency of the existing law against cheating by rendering it an indictable offence to cheat another of his money or goods, by *any false pretences whatsoever*. Similar statutes have been enacted in many of the United States; but they are generally construed to extend only to such pretences as are calculated to mislead persons of ordinary prudence and caution. See Rex *v.* Young, 3 T. R. 98; Rex *v.* Goodhall, 1 Russ. & Ry. 461; The People *v.* Williams, 4 Hill (N. Y.), R. 9; The State *v.* Mills, 17 Maine, 211; Commonwealth *v.* Wilgus, 4 Pick. 177; Commonwealth *v.* Drew, 19 Pick. 179; Commonwealth *v.* Call, 21 Pick. 515; The People *v.* Galloway, 17 Wend. 540.

[3] Rex *v.* Mason, 1 T. R. 581; 2 East, P. C. 837.

[4] Rex *v.* Dale, 7 C. & P. 352; Rex *v.* Story, 1 Russ. & Ry. 80; The State *v.* Dunlap, 24 Maine, 77; The State *v.* Mills, 17 Maine, 211; 14 Wend. 547, per Walworth, Ch.; Rex *v.* Perrott, 2 M. & S. 379.

[5] The State *v.* Woodson, 5 Humph. 55; The People *v.* Genung, 11 Wend. 18; Commonwealth *v.* Wilgus, 4 Pick. 177.

# CONSPIRACY.

[* § 89. Conspiracy defined.
90. Objects of, divided into five classes.
90 *a*. Definition of, deduced from late cases.
91. Unlawful agreement and combination essence of offence.
92. Order of putting in testimony.
93. Evidence generally circumstantial.
94. Acts and declarations of other conspirators, how far admissible as part of the *res gestæ*.
95. Where the act to be done is unlawful, means intended to be employed need not be alleged.
96. Evidence confined to particular allegations in indictment.
97. Where two are indicted and one acquitted the other must be acquitted.
98. Wife of one conspirator cannot be a witness for other conspirators.
99. Correspondence between defendants sometimes read in defence of one.]

§ 89. A CONSPIRACY may be *described*, in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.[1] It is not essential that the act intended to be

[1] The books contain much discussion on the nature and definition of this offence; but this description being one of the most recent, and given upon great consideration, is deemed sufficient. See Commonwealth *v.* Hunt, 4 Met. 111. The learned Chief Justice, in delivering the judgment in that case, expounded what may be regarded as the general doctrine of American law on this subject, as follows: "We have no doubt, that by the operation of the constitution of this Commonwealth, the general rules of the common law, making conspiracy an indictable offence, are in force here, and that this is included in the description of laws which had, before the adoption of the constitution, been used and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised in the courts of law. Const. of Mass. c. vi. § 6. It was so held in Commonwealth *v.* Boynton, and Commonwealth *v.* Pierpont, cases decided before reports of cases were regularly published,* and in many cases since. Commonwealth *v.* Ward, 1 Mass. 473; Commonwealth *v.* Judd, and Commonwealth *v.* Tibbetts, 2 Mass. 329, 536; Commonwealth *v.* Warren, 6 Mass. 74. Still, it is proper in this connection to remark, that although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confederate and combine together by concerted means to do that which is unlawful, or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine, whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective coun-

* See a statement of these cases, in 3 Law Reporter, 295, 296.

done should be punishable by indictment; for if it be designed to destroy a man's reputation by verbal slander,[1] or to seduce a female to elope from her parents' house for the purpose of prostitution, the conspiracy is a criminal offence, though the act itself be not indictable.[2]

§ 90. The *objects* of this crime, though numerous and multiform, may be classified as follows: — 1st. *To perpetrate an offence which is already punishable by law;* as, for example, to commit a murder or other felony, or a misdemeanor, such as to vilify the government and embarrass its operations; or to sell lottery-tickets

tries. All those laws of the parent country, whether rules of the common law, or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship, — not being adapted to the circumstances of our colonial condition, — were not adopted, used, or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases, would not be a precedent for a like conviction here. The King *v.* Journeyman Tailors of Cambridge, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction of journeyman mechanics of a conspiracy to raise their wages. It was there held, that the indictment need not conclude *contra formam statuti*, because the gist of the offence was the conspiracy, which was an offence at common law. At the same time it was conceded, that the unlawful object to be accomplished, was the raising of wages above the rate fixed by a general act of parliament. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful, if not criminal." "But the great difficulty is, in framing any definition or description, to be drawn from the decided cases, which shall specifically identify this offence, — a description broad enough to include all cases punishable under this description, without including acts which are not punishable. Without attempting to review and reconcile all the cases, we are of opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment." See 4 Met. 121 – 123. And see The People *v.* Mather, 4 Wend. 229, 259; The State *v.* Rowley, 12 Conn. 101; Commonwealth *v.* Carlisle, 1 Journ. Jurisp. 225, per Gibson, J.; Regina *v.* Vincent, 9 C. & P. 91, per Alderson, B.; Rex *v.* Seward, 1 Ad. & El. 713, per Ld. Denman. As to conspiracies to obtain goods under pretence of buying them, in fraud of the vendor, and the mode of charging this offence, see Commonwealth *v.* Eastman, 1 Cush. 189; 1 Leading Cases, 264, and note; Commonwealth *v.* Shedd, 7 Cush. 514; The State *v.* Roberts, 34 Maine, 320; The State *v.* Hewett, 31 Id. 396; The State *v.* Ripley, Id. 386; Hartmann *v.* The Commonwealth, 5 Carr. 60.

[1] 4 Met. 123, per Shaw, C. J.; Rex *v.* Armstrong, 1 Vent. 304.

[2] Rex *v.* Delaval, 3 Burr. 1434; 1 Leading Crim. Cases, 457; Regina *v.* Mears, 15 Jur. 56; 1 Leading Crim. Cases, 462; 4 Cox, C. C. 423; 2 Denison, C. C. 79; Temple *v.* Mew, C. C. 414; 1 Eng. Law and Eq. R. 581; Rex *v.* Ld. Grey, 1 East, P. C. 460; Mifflin *v.* The Commonwealth, 5 W. & Serg. 561; Anderson *v.* The Commonwealth, 5 Rand, 627; Respublica *v.* Hevice, 2 Yeates, 114; The State *v.* Murphy, 6 Ala. 765; [The State *v.* Norton, 3 Zabriskie, 33.]

when forbidden by law; and the like.[1] And here it may be observed, that where the conspiracy to commit a felony is carried into effect, the crime of conspiracy, which is a misdemeanor, is merged in the higher offence of felony; but that if the object of the conspiracy be to commit a misdemeanor only, and it be committed, the offence of conspiracy is not merged, but is still separately punishable.[2] 2dly. *To injure a third person* by charging him with a *crime*, or with any other act *tending to disgrace and injure him*, or with intent to *extort money* from him by putting him in fear of disgrace or harm; or by *defrauding him* of his property, or ruining his *reputation*, *trade*, or *profession*. Of this class are conspiracies to indict a man of a crime, in order to extort money from him;[3] or falsely to charge a man with the paternity of a bastard child;[4] or with fraudulently abstracting goods from a bale;[5] or, to make him drunk in order to cheat him;[6] or, to impose inferior goods upon another, as and for goods of another and better kind, in exchange for goods of his own;[7] or, to impoverish a man by preventing him from working at his trade;[8] or, to defraud a corporation.[9] But it is said, that if the act to be done is merely a civil trespass, such as to poach for game,[10] or, to sell an unsound horse with a false warranty of soundness,[11] an indictment will not lie. 3dly. To do an act tending to *obstruct, pervert, or defeat the course of public justice*. Hence it is an indictable offence to conspire to obtain from magistrates a false certificate that a highway is in good repair, in order to influence the judgment to be pronounced against the parish for not repairing;[12] or, to dissuade a

[1] Commonwealth *v.* Crowninshield, 10 Pick. 497; Rex *v.* Vincent, 9 C. & P. 91; Commonwealth *v.* Kingsbury, 5 Mass. 106; The State *v.* Buchanan, 5 H. & J. 317.

[2] Ibid; The People *v.* Mather, 4 Wend. 265; The State *v.* Murray, 15 Maine, 100.

[3] Rex *v.* Hollingberry, 4 B. & C. 329; 6 D. & R. 345. If the object be to extort money from him, it is immaterial whether the charge be true or false. Ibid. And see Wright *v.* Black, Winch, 28, 54.

[4] 1 Hawk. P. C. ch. 72, § 2; Regina *v.* Best, 2 Ld. Raym. 1167. And see Commonwealth *v.* Tibbetts, 2 Mass. 536.

[5] Rex *v.* Rispal, 3 Burr. 1320; 1 W. Bl. 368.

[6] The State *v.* Younger, 1 Dever. 357.

[7] Rex *v.* Macarty, 2 Ld. Raym. 1179; The State *v.* Rowley, 12 Conn. 101. So, to defraud a trader of his goods by false pretences. If the parties conspire to obtain money by false pretences of existing facts, it is no objection to the indictment for conspiracy, that the money was to be obtained through the medium of a *contract*. Regina *v.* Kendrick, 5 Q. B. 49; Dav. & M. 208. And see Regina *v.* Button, 12 Jur. 1017; Regina *v.* Gompertz, 9 Q. B. 824; 2 Cox, C. C. 145; Commonwealth *v.* Ward, 1 Mass. 473.

[8] Rex *v.* Eccles, 1 Leach, C. C. (4th ed.) 274.

[9] The State *v.* Buchanan, 5 Har. & J. 317; Commonwealth *v.* Warren, 6 Mass. 74; Lambert *v.* The People, 7 Cowen, 166.

[10] Rex *v.* Turner, 13 East, 228. This case has been overruled. See *infra*, § 90 *a*, note.

[11] Rex *v.* Pywell, 1 Stark. R. 402. See *infra*, § 90 *a*.

[12] Rex *v.* Mawbey, 6 T. R. 619.

witness from attending court and giving evidence ;[1] or, to procure false testimony ; or, to affect and bias witnesses by giving them money ;[2] or, to publish a libel, or handbills, with intent to influence the Jurors who might try a cause ;[3] or, to procure certain persons to be placed upon the Jury.[4] 4thly. To do an act, *not unlawful in an individual*, but with intent either to accomplish it by *unlawful means*, or to carry into effect a design of *injurious tendency to the public.* Of this nature are conspiracies to maintain each other, right or wrong ;[5] or, to raise the price of stocks or goods by artificial excitement beyond what they would otherwise bring.[6] So, where certain brokers agreed together, before a sale at auction, that only one of them should bid on each article sold, and that the articles purchased should afterwards be sold again by themselves, and the proceeds divided ; it was held a conspiracy.[7] So, if the workmen of any trade conspire to raise the price of wages by the adoption of rules with penalties, or other unlawful means of coercion ;[8] or if the masters in like manner conspire to reduce them.[9] 5thly. *To defraud and cheat the public*, or *whoever may be cheated.* Of this class are conspiracies to manufacture base and spurious goods, and sell them as genuine ;[10] and conspiracies to raise the market prices by false news and artificial excitements, as already mentioned ; and conspiracies to smuggle goods in fraud of the revenue ;[11] or to defraud traders of their goods by false pretences ;[12] and the like.

[§ 90 *a.* Without attempting to reconcile all the cases, a task nearly hopeless in the present undefined state of the law of con-

[1] Rex *v.* Steventon, 2 East, R. 362. So, to destroy evidence. The State *v.* De Witt, 1 Hill (S. Car.), R 282.

[2] Rex *v.* Johnson, 2 Show. 1.

[3] Rex *v.* Gray, 1 Burr. 510; Rex *v.* Jolliffe, 4 T. R. 285; Rex *v.* Burdett, 1 Ld. Raym. 148.

[4] Rex *v.* Opie, 1 Saund. 301. [A conspiracy to procure certain persons to violate a statute, for the purpose of extorting money from them by compounding their offences, is indictable whether the illegal acts were procured or not. Hazen *v.* The Commonwealth, 23 Penn. 355. *Aliter* if the object to secure the detection of suspected offenders Ibid.]

[5] The Poulterer's case, 9 Co. 56.

[6] Rex *v.* De Berenger, 3 M. & S. 68; Rex *v.* Norris, 2 Ld. Ken. 300; Rex *v.* Hilbers, 2 Chitty, R. 163.

[7] Levi *v.* Levi, 6 C. & P. 239.

[8] The People *v.* Fisher, 14 Wend. 9; Commonwealth *v.* Hunt, 4 Met. 111; Rex *v.* Bykerdyke, 1 M. & Rob. 179.

[9] Per Ld. Kenyon, in Rex *v.* Hammond, 2 Esp. R. 719, 720.

[10] Commonwealth *v.* Judd, 2 Mass. 329.

[11] Regina *v.* Blake, 8 Jur. 145; Id. 666; 6 Q. B. 126.

[12] King *v.* Regina, 9 Jur. 833; 7 Q. B. 782; Rex *v.* Roberts, 1 Campb. 399. [As to whether a conspiracy to cheat and defraud an individual of his goods or lands is indictable at common law, without specifying the means or proving that they were criminal, see Regina *v.* Gompertz, 9 Q. B. 824; Sydserff *v.* Regina, 11 Id. 245; Rex *v.* Gill, 2 B & Ald. 204; The People *v.* Richards, 1 Mich. 216; Alderman *v.* The People, 4 Id. 414. The People *v.* Lambert, 9 Cowen, 78; Commonwealth *v.* Shedd, 7 Cush. 514; Commonwealth *v.* Eastman, 1 Id. 189; The State *v.* Roberts, 34 Maine, 320.]

spiracy, a general rule may be deduced from the current of well-considered cases, that an indictable conspiracy must be a corrupt confederation to promote an evil in some degree *criminal*, or to effect some wrongful end by means having some degree of *criminality*. Although in some cases, it has been said, that, if the end is *unlawful*, concerted action to promote it is indictable,[1] yet the word "unlawful" is to be taken in the sense of *criminal*,[2] as it is unlawful to commit a trespass; still no indictment will lie for a conspiracy to commit such a civil injury.[3] Indeed, unless some element of a criminal nature enters into either the means to be used or the purpose to be effected, no indictment will lie for a conspiracy to do a private injury when a civil action will afford redress. As examples of the means, a concert by *numbers* to destroy a man's reputation, or by false accusation to cause one wrongfully to pay money; or, as to the end, to take away a female for the purposes of prostitution, this being an offence punishable in the ecclesiastical courts;[4] or, to do something which may affect the public mediately or immediately.[5] There is, however, a disposition in the Courts not to extend the law of conspiracy beyond its present limits, and to confine it, as is believed, within the definition above given.[6]]

§ 91. The *essence* of this offence consists in the *unlawful agreement and combination* of the parties; and therefore it is completed whenever such combination is formed, although no act be done towards carrying the main design into effect. If the ultimate design was unlawful, it is of no importance to the completeness of the offence, whether the means were lawful or not; as, for exam-

[1] Commonwealth *v.* Hunt, 4 Met. 111; O'Connell *v.* Regina, 11 Cl. & Fin. 155; 9 Jur. 25.

[2] Commonwealth *v.* Shedd, 7 Cush. 514.

[3] Rex *v.* Pywell, 1 Stark. R. 402; Rex *v.* Turner, 13 East, 228. The authority of Rex *v.* Pywell has been shaken; Regina *v.* Kenrick, 5 Q. B. 62; but not upon this point. Rex *v.* Turner, cited with approbation in Commonwealth *v.* Hunt, 4 Met. 111, has been distinctly overruled; Regina *v.* Rowlands, 5 Cox, C. C. 490; 2 Denison, C. C. 388; 9 Eng. Law & Eq. R. 292; upon the ground that the indictment charged an agreement to commit an indictable offence as well as the use of unlawful means, to wit, armed numbers prepared for resistance by force. And see The State *v.* Rickey, 4 Halst. 293; *In re* Turner, 9 Q. B. 80. Regina *v.* Daniell, 6 Mod. 99. [See Regina *v.* Carlisle, 25 Eng. Law & Eq. R. 577.]

[4] Rex *v.* Delaval, 3 Burr. 1434; 1 Leading Crim. Cases, 457; Rex *v.* Lord Gray, 9 Howell, St. Tr. 127.

[5] Rex *v.* De Berenger, 3 M. & S. 67.

[6] Commonwealth *v.* Hunt, 4 Met. 124; Commonwealth *v.* Eastman, 1 Cush, 189; 1 Leading Crim. Cases, 264. [* A combination to induce a witness to go from one State to another to testify, by means of pecuniary inducements, is not a conspiracy, unless the design is to induce him to testify falsely; and therefore the acts and declarations of one of the persons so combining are not admissible in evidence against the others. Commonwealth *v.* Smith, 11 Allen, 243.]

ple, in a conspiracy to extort money from a man by means of a criminal charge, the conspiracy for this object is criminal, whether he be guilty or not of the offence imputed to him. On the other hand, if the ultimate object is not unlawful, the combination to effect it is not an offence, unless the means intended to be employed are unlawful.[1]

§ 92. We have shown, in a preceding volume, that in *proving this offence*, no evidence ought, in strictness, to be given of the acts of strangers to the record, in order to affect the defendants, until the fact of a conspiracy with them is first shown, or until at least a *primâ facie* case is made out either against them all, or against those who are affected by the evidence proposed to be offered; and that of the sufficiency of such *primâ facie* case, to entitle the prosecutor to go into other proof, the Judge, in his discretion, is to determine. But this, like other rules in regard to the *order* in which testimony is to be adduced, is subject to exceptions, for the sake of convenience; the Judge sometimes permitting evidence to be given, the relevancy of which is not apparent at the time when it is offered, but which the prosecutor or counsel shows will be rendered so, by other evidence which he undertakes to produce.[2] Accordingly, it is now well settled in England, and such is conceived to be the rule of American law, that on a prosecution for a crime to be proved by conspiracy, general evidence of a conspiracy may in the first instance be received as a preliminary to the proof that the defendants were guilty participators in that conspiracy; but, in such cases, the general nature of the whole evidence intended to be adduced should be previously opened to the Court, so that the Judge may form an opinion as to the probability of affecting the individual defendants by particular proof, applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if, upon such opening, it should manifestly appear that no particular proof, sufficient to affect the defendants, is intended to be adduced, it would be the duty of the Judge to stop the

[1] Rex *v.* Best, 2 Ld. Raym. 1167; 1 Salk. 174; Rex *v.* Spragg, 2 Burr. 993; Rex *v.* Rispal, 3 Burr. 1320; O'Connell *v.* Regina, 11 Cl. & Fin. 155; 9 Jur. 25. [The unlawful conspiracy is the gist of the offence, and therefore it is not necessary to allege or prove the execution of the agreement. State *v.* Noyes, 25 Vt. 415.] [* A common design is the essence of the charge of conspiracy; and this is made to appear where the parties steadily pursue the same object, whether acting separately or together by common or different means all leading to the same unlawful result; United States *v.* Cole, 5 McLean, 513.]

[2] See *ante*, Vol. 1, § 51 *a*; Ib. § 111; 2 Stark. Evid. 234; Rex *v.* Hammond, 2 Esp. R. 719; [* United States *v.* Cole, 5 McLean, 513.]

cause *in limine*, and not to allow the general evidence to be received.[1]

§ 93. The *evidence* in proof of a conspiracy will generally, from the nature of the case, be *circumstantial*. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms, to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the Jury will be justified in the conclusion, that they were engaged in a conspiracy to effect that object.[2] Nor is it necessary to prove that the conspiracy originated with the defendants; or that they met during the process of its concoction; for every person, entering into a conspiracy or common design already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.[3]

§ 94. The *principle* on which the *acts and declarations of other conspirators*, and acts done at different times, are admitted in evidence against the persons prosecuted, is, that by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestæ*, and therefore the act of all. It is the same principle of identity with each other, that governs in regard to the acts and admissions of agents, when offered in evidence against their principals, and of partners, as against the partnership, which has already been considered.[4] And here, also, as in those cases, the evidence of what was said and done by the other conspirators must

[1] The Queen's case, 2 Brod. & Bing. 310, by all the Judges. And see Regina *v.* Frost, 9 C. & P. 129; Rex *v.* Hunt, 3 B. & Ald. 566; 2 Russ. on Crimes, 699, 700.

[2] Regina *v.* Murphy, 8 C. & P. 297, per Coleridge, J. And see Commonwealth *v.* Ridgway, 2 Ashm. 247; [United States *v.* Cole, 5 McLean, 513.]

[3] Ibid. And see *ante*, Vol. 1, § 111, and cases there cited; Rex *v.* Cope, 1 Stra. 144; Rex *v.* Parsons, 1 W. Bl. 393; Rex *v.* Lee, 2 McNally on Evid. 634; Rex *v.* Hunt, 3 B. & Ald. 566; Rex *v.* Salter, 5 Esp. R. 225; Commonwealth *v.* Warren, 6 Mass. 74; The People *v.* Mather, 4 Wend. 259.

[4] See *ante*, Vol. 1, § 108–114; Rex *v.* Salter, 5 Esp. 125; Collins *v.* The Commonwealth, 3 S. & R. 220; The State *v.* Soper, 16 Maine, 293; Aldrich *v.* Warren, Id. 465; Regina *v.* Shellard, 9 C. & P. 277; Regina *v.* Blake, 6 Q. B. 126; Rex *v.* Stone, 6 T. R. 528. And see Hardy's case, 24 Howell's St. Tr. 199; [United States *v.* Cole, 5 McLean, 513.]

be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design; what was said or done by them before or afterwards not being within the principle of admissibility.[1]

§ 95. Where the conspiracy was to do an act in itself unlawful, the *means* intended to be employed to effect the object are not usually stated in the indictment; nor is it necessary, in such case, to state them; but if the conspiracy was carried out, to the full accomplishment of its object, it is necessary to state what was done, and the persons who were thereby injured or defrauded; and if property was wrongfully obtained, to state what and whose property it was. If, however, in the former case, the means to be employed are set forth, it is conceived that the prosecutor is bound to prove the allegation, as he certainly ought to do, in the latter case. So, if the object to be effected was not unlawful, but the means intended to be employed were unlawful, it is obvious that, as the criminality of the design consists in the illegality of the means to be resorted to for its accomplishment, these means must be described in the indictment, and proved at the trial.[2]

§ 96. In the proof of this offence, as well as of others, the evidence will be *confined to the particular allegations* in the indictment. Thus, if the indictment charges an intent to defraud J. S. *and others*, of their goods, and it appears at the trial that J. S. was one of a commercial house, the evidence must be confined to J. S. and *his partners;* and evidence of an intent to defraud any other persons is inadmissible.[3] So, if the alleged intent be to defraud A., evidence of an intent to defraud the public generally, or whoever might be defrauded, will not support the allegation.[4] But if the alleged intent be, to accomplish several illegal objects, it will not be necessary to prove all the particulars of the charge; but it will be sufficient if a conspiracy to effect any one of the illegal objects, mentioned in the indictment, be proved.[5] So, if an intent be alleged to prevent *the workmen* of A. from continuing to work, it is proved by evidence of an intent to prevent any from so continuing.[6] So, if the indictment be against journeymen for a con-

[1] Ibid.; Regina *v.* Murphy, 8 C. & P. 297; Regina *v.* Shellard, 9 C. & P. 277.

[2] 2 Russ. on Crimes, 694, 695, n.; Regina *v.* Parker, 6 Jur. 822; 3 Q. B. 292; 2 G. & D. 709.

[3] Regina *v.* Steel, Car. & Marsh. 337; 2 Moody, C. C. 246.

[4] Commonwealth *v.* Harley, 7 Met. 506; Commonwealth *v.* Kellogg, 7 Cush. 473; *ante*, § 17, note.

[5] O'Connell *v.* Regina, 11 Cl. & Fin. 155; 9 Jur. 25.

[6] Rex *v.* Bykerdyke, 1 M. & Rob. 179.

spiracy to prevent their employers from taking *any apprentices*, it will be proved by evidence of their having quitted their employment, with intent to compel their employers to dismiss *any person* as an apprentice.[1] And if the indictment contain allegations of several illegal acts done, pursuant to the conspiracy, on a *certain day*, evidence is admissible of *such* acts, done on *different days*.[2]

§ 97. If two only be charged with a conspiracy, and one be acquitted, the other must also be acquitted, though he be guilty of doing the act charged; for it will be no conspiracy, however otherwise it may be criminal. And if one of several defendants charged with this offence be acquitted, the record of his acquittal is admissible in evidence, in favor of another of the defendants, subsequently tried.[3] But if two be indicted, and one die before the trial; or if three be indicted, and one be acquitted and the other die; this is no defence for the other.[4] Nor is it exceptionable that one is indicted alone, if the charge be of a conspiracy with other persons to the Jurors unknown.[5]

§ 98. The wife of one of several conspirators is not admissible as a witness for the others; the acquittal of the others being a ground for discharging her husband. Nor is she a competent witness against him.[6] And it is said that if a man and woman are jointly indicted for a conspiracy, proof that they were husband and wife will generally be a complete defence against the charge; on the ground, that being regarded as one person in law, the husband alone is responsible for the act done. But indictments against the husband and wife, for this offence, have been sup-

[1] Rex *v.* Ferguson, 2 Stark. R. 489.

[2] Rex *v.* Levy, 2 Stark. R. 458. And see Rex *v.* Charnock, 4 St. Tr. 570.

[3] Rex *v.* Tooke, 1 Burn's Just. 823 (Chitty's ed.); The State *v.* Tom, 2 Dev. 569. [If all be convicted, and a new trial be granted on grounds applicable only to one, it must be granted to all; but, if some be convicted and others acquitted, a new trial may be granted to the former without disturbing the verdict as to the latter. Regina *v.* Gompertz, 9 Q. B. 824.]

[4] The People *v.* Olcott, 2 Johns. Cas. 301; Rex *v.* Kinnersley, 1 Stra. 193; Rex *v.* Niccolls, 2 Stra. 1227.

[5] The People *v.* Mather, 4 Wend. 229, 265. In a very recent case, in the Court of Queen's Bench, the indictment charged A., B., and C. with conspiring together, and "with divers other persons to the Jurors unknown." The Jury found that A. had conspired with either B. or C., but that they could not say with which. The evidence at the trial applied only to A., B., and C. On this finding it was held that A. was entitled to an acquittal. Regina *v.* Thompson, 20 L. J., M. C. 183; 5 Cox, C. C. 166; 4 Eng. Law & Eq. R. 287.

[6] Commonwealth *v.* Robinson, 1 Gray, 555; Commonwealth *v.* Marsh, 1 Leading Crim. Cases, 124, note; Rex *v.* Locker, 5 Esp. 107; Rex *v.* Serjeant, Ry. & M. 352; Rex *v.* Smith, 1 Moody, C. C. 289; 1 Hawk. P. C. ch. 41, § 13; Commonwealth *v.* Easland, 1 Mass. 15; Pullen *v.* The People, 1 Doug. 48 (Mich.). But see The State *v.* Anthony, 1 McCord, 285. See further, as to the competency of the wife, *ante*, Vol. 1, § 335, 342, 407, and cases there cited.

ported, where *others* were indicted jointly with them.[1] And if the conspiracy were concocted before the marriage, their subsequent marriage is no defence.[2]

§ 99. In some cases, the correspondence between the defendants may be read in exculpation of one of them. Thus, where two persons were indicted of a conspiracy to defraud a third person of his money, by inducing him to lend it to one of them upon a false representation of his titles to certain estates; and the latter had left the country, and the other defended himself on the ground that his co-defendant had made the same representations to him, and led him to believe them to be true, and his titles valid; the correspondence between them on this subject was held admissible, to show that the party on trial was in fact the dupe of the other, and had acted in good faith.[3]

[1] Commonwealth *v.* Wood, 7 Law Reporter, 58; Rex *v.* Locker, 5 Esp. 107.

[2] In Rex *v.* Robinson and Taylor, 1 Leach, C. C. (4th ed.), 37; 2 East, P. C. 1010, a servant woman conspired with a man, that he should personate her master, and marry her, with intent fraudulently to raise a specious title to his property, and the marriage was accordingly celebrated; for which they were afterwards indicted and convicted, and the conviction was held good.

[3] Rex *v.* Whitehead, 1 C. & P. 67.

# EMBRACERY.[1]

[* § 100. Embracery defined.
101. Acts constituting the crime must be specifically charged and proved.]

§ 100. The crime of *embracery*, which is an offence against public justice, consists in attempting to corrupt, instruct, or influence a Jury beforehand, or to incline them to favor one side of a cause in preference to the other, by promises, persuasions, entreaties, letters, money, entertainments, and the like; or by any other mode except by the evidence adduced at the trial, the arguments of counsel, and the instructions of the Judge.[2] The giving of money to another, to be distributed among the Jurors, and procuring one's self or others to be returned as talesman, in order to influence the Jurors, are also offences of this description.[3] It may also be committed by one of the Jurors, by the above corrupt

[1] An indictment for Embracery may be in this form: —

The Jurors (&c.) on their oath present, that A. B. of ——, on ——, at ——, in said county of ——, knowing that a certain Jury of said county of ——, was then duly returned, impanelled, and sworn to try a certain issue in the —— (*describing the Court*), then held and in session according to law, at —— aforesaid, in and for said county of ——, between C. D., plaintiff, and E. F., defendant, in a plea of ——; and then also knowing that a trial was about to be had of the said issue in the Court last aforesaid, then in session as aforesaid; and unlawfully intending to hinder a just and lawful trial of said issue by the Jury aforesaid returned, impanelled, and sworn as aforesaid to try the same; on ——, at ——, in the county aforesaid, unlawfully, wickedly, and unjustly, on behalf of the said E. F., the defendant in said cause, did solicit and persuade one G. H., one of the Jurors of said Jury returned, impanelled, and sworn as aforesaid, for the trial of said issue, to appear, attend, and give his verdict in favor of the said E. F., the defendant in said cause; and then and there did utter to the said H. G., one of said Jurors, divers words and discourses by way of commendation of the said E. F., and in disparagement of the said C. D., the plaintiff in said cause; and then and there unlawfully and corruptly did move and desire the said G. H. to solicit and persuade the other Jurors, returned, impanelled, and sworn to try the said issue, to give their verdict in favor of the said E. F., the defendant in said cause, the said A. B. then and there well knowing the said G. H. to be one of the Jurors returned, impanelled, and sworn as aforesaid; against the peace, &c.

Some precedents of indictments for this offence contain an allegation, that the Jury gave their verdict for the defendant, by reason of the words, discourses, &c., spoken. But this is unnecessary. The crime is complete by the attempt, whether it succeed or not. Hawk. P. C. b. 1, ch. 85, § 1, 2; 1 Deacon, Crim. Law. 378.

[2] 4 Bl. Comm. 140; 1 Deacon, Crim. Law, 378; 1 Russ. on Crimes, 182; 1 Inst. 369 *a*; 1 Hawk. P. C. ch. 85, § 1; Gibbs *v.* Dewey, 5 Cowen, 503. See Knight *v.* Freeport, 13 Mass. 218.

[3] 1 Hawk. P. C. ch. 85, § 3; Rex *v.* Opie, 1 Saund. 301; 1 Russ. on Crimes, 182.

practices upon his fellows. It is not material to this offence that any verdict be rendered in the cause; nor whether it be true or false, if rendered.

§ 101. As this offence cannot be prosecuted under a general charge, but the acts constituting the crime must be specifically set forth in the indictment, the proof on either side will consist of evidence proving or disproving the commission of the acts set forth as done by the defendant.

# FORGERY.

[* § 102. Statute provisions, additional to common law.
103. Forgery, the fraudulent making or alteration of a writing, to the prejudice of another man's right.
104. Not necessary to prove *entire* instrument fictitious.
105. Instrument must be calculated to deceive.
106. Proof that the writing is false may be by person acquainted with genuine, or by comparison.
107. Forged writing, if in existence, must be produced at trial.
108. Must agree in all essential respects with description in indictment.
109. If prisoner represent it as particular person's note, evidence that it is not, *primâ facie* proof of forgery.
110. Allegation of uttering and publishing proved by evidence that prisoner offered to pass instrument, declaring it good.
111. In proof of criminal uttering, guilty knowledge must be proved.
111 *a*. Other utterings previous to principal charge admissible to prove scienter.
112. What evidence necessary to prove place where forgery was committed.
113. Parol evidence admissible to prove that the person whose name appears on bank-note as president, is president.]

§ 102. In all the United States, this offence is punishable by statute; but it is conceived that these statutes do not take away the character of the offence, as a crime or misdemeanor at common law, but only provide additional punishments, in the cases particularly enumerated in the statutes.[1] By the common law, every forgery is at least a misdemeanor, though some, such as forgeries of royal charters, writs, &c., were felonies, and in some cases were punished as treasons.[2]

§ 103. It seems to have been the opinion of some of the old

[1] Commonwealth *v.* Ayer, 3 Cush. 150; The State *v.* Ames, 2 Greenl. 365.

[2] This distinction is mentioned by Glanville, the earliest of the common-law authors, who wrote in the time of Henry II., about the year 1180. He observes that "the crime of falsifying, in a general sense, comprises under it many particular species, as, for example, false charters, false measures, false money, and others of a similar description." And he adds, "that if a person should be convicted of falsifying a charter, it becomes necessary to distinguish whether it be a royal or a private charter," because of the diversity of punishments which he mentions; the former being punishable as treason, and the latter by the loss of members only. Glanville, b. 14, ch. 7. The same distinction is alluded to by Bracton, lib. 3, ch. 3, § 2, and ch. 6, and in The Mirror, ch. 4, § 12. Falsifying the seal of one's lord was also punishable capitally, as treason; but forgeries less heinous were punished by the pillory, tumbril, or loss of members; as appears from Britton, ch. 4, § 1; Id.

writers on criminal law, that forgery could not be committed of a private writing, unless it was under seal; but this opinion has long since been discarded; and it is now well settled that forgery, in the sense of the common law, may be *defined*, as "the fraudulent making or alteration of a writing, to the prejudice of another man's right."[1] It may be committed of any writing, which, if genuine, would operate as the foundation of another man's liability, or the evidence of his right, such as a letter of recommendation of a person as a man of property and pecuniary responsibility;[2] an order for the delivery of goods;[3] a receipt;[4] or a railway pass;[5] as well as a bill of exchange, or other express contract.[6] So, it may be committed by the person's fraudulently writing his own name, where he was not the party really meant, though of the same name; as, where one who was not the real payee of a bill of exchange, but of the same name, indorsed his own name upon it, with intent to give it currency as though it were duly negotiated;[7] or, where one claimed goods as the real consignee, whose name

ch. 8, § 4, 5; Fleta, lib. 1, ch. 22; Id. lib. 2, ch. 1; 3 Inst. 169; 2 Ld. Raym. 1464. And see 2 Russ. on Crimes, 357, 358; Commonwealth *v.* Boynton, 2 Mass. 77.

[1] 4 Bl. Comm. 247. Forgery at common law is defined by Russell (2 Crim. Law, 318), and his definition has been adopted by the Supreme Judicial Court of Massachusetts, to be "a false making, or making *malo animo*, of any written instrument, for the purpose of fraud and deceit." Commonwealth *v.* Ayer, 3 Cush. 150. And see Rex *v.* Ward, 3 Ld. Raym. 1461; 2 Russ. on Crimes, 318, 357, 358; Alison's Crim. Law of Scotland, p. 371. [* Forgery may be of a printed or engraved, as well as of a written, instrument. Commonwealth *v.* Ray, 3 Gray, 441. But it must be of some document or writing; therefore the painting an artist's name in the corner of a copy of a picture, in order to pass it off as an original picture by that artist is not a forgery. Reg. *v.* Closs, 3 Jur. (N. S.) 1309.]

[2] The State *v.* Ames, 2 Greenl. 365; The State *v.* Smith, 8 Yerg. 151; Commonwealth *v.* Chandler, Thach. Cr. Cas. 187.

[3] The People *v.* Fitch, 1 Wend. 198; The State *v.* Holly, 2 Bay, 262. The false making of an acceptance of a conditional order for the delivery of goods, is forgery at common law. Commonwealth *v.* Ayer, 3 Cush. 150. [A railway company paid its dividends, by an order or warrant addressed to the company's banker. The document required the shareholder's indorsement, and it would not be paid by the banker, even to the shareholder himself, without such indorsement. A clerk of the company, having forged an indorsement of the shareholder's name, was held properly convicted of forgery. Regina *v.* Autey, 7 Cox, 329.]

[4] The State *v.* Foster, 3 McCord, 442. [A person who utters a forged pawnbroker's duplicate may be indicted for uttering a forged receipt. Regina *v.* Fitchie, 40 Eng. Law & Eq. R. 598.]

[5] Regina *v.* Boult, 2 C. & K. 604; Commonwealth *v.* Ray, 3 Gray, 441.

[6] In Massachusetts, the society of Odd Fellows has regulations by which a member in sickness is entitled to a weekly allowance of money, upon producing a certificate of a physician. A case recently occurred of a forgery of such a certificate. Commonwealth *v.* Ayer, 3 Cush. 153. [* Making a false entry in what purports to be a banker's pass-book, with intent to defraud, is a forgery. Reg. *v.* Smith, 1 L. & C. C. C. 168.]

[7] Mead *v.* Young, 4 T. R. 28. And see Rex *v.* Parkes, 2 Leach, C. C. (4th ed.) 775; 2 East, P. C. 963. [* The drawer of a check on a bank which was duly honored, and returned to him by the bank, afterwards altered his signature in order to give it the appearance of forgery, and to defraud the bank and cause the payee of the check to be charged with forgery. Held, this alteration was not a forgery. Brittain *v.* Bank of London, 3 F. & F. 465.]

was identical with his own, and, in that character, signed over the permit for their landing and delivery, to one who advanced him money thereon.[1] So, if one sign a name wholly fictitious, it is forgery.[2] But if there be two persons of the same name, but of different descriptions and addresses, and a bill be directed to one, with his proper address, and be accepted by the other with the addition of his own address, it is not forgery.[3] Nor is this crime committed, where the paper forged appears on its face to be void; as where it was a promise to pay a certain sum in work and labor, with no mention of value received in the note, and no averment of any in the indictment;[4] or where a will is forged, without the requisite number of witnesses.[5] To constitute this offence, it is also essential that there be an *intent to defraud;* but it is not essential that any person be actually defrauded, or that any one act be done towards the attainment of the fruits of the crime, other than making or altering the writing.[6] Nor is it necessary that the party should have had present in his mind an intention to defraud a *particular* person, if the consequences of his act would necessarily or possibly be to defraud *some* person;[7] but there must, at all events, be a possibility of some person being defrauded by the forgery.[8]

[1] The People *v.* Peacock, 6 Cowen, 72.

[2] Rex *v.* Bolland, 1 Leach, C. C. (4th ed.) 83; 2 East, P. C. 958; Rex *v.* Taylor, 1 Leach, C. C. (4th ed.) 214; 2 East, P. C. 960; Rex *v.* Marshall, Russ. & Ry. 75; 2 Russ. on Crimes, 331–340. [But it is not forgery to sign a note with the name of a fictitious firm, the signer falsely representing himself and another to be members thereof. Commonwealth *v.* Baldwin, 21 Law Rep. 562.]

[3] Rex *v.* Webb, 3 Brod. & Bing. 228; Bayley on Bills, 605; Russ. & Ry. 405.

[4] The People *v.* Shall, 9 Cowen, 778; Rex *v.* Jones, 1 Leach, C. C. (4th ed.) 204; [People *v.* Harrison, 8 Barb. 560; Commonwealth *v.* Ray, 3 Gray, 441; State *v.* Humphreys, 10 Humph. 442.] [* But where the invalidity is to be made out by proof of some extrinsic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same may be punished. State *v.* Pierce, 8 Clarke (Iowa), 231.]

[5] Rex *v.* Wall, 2 East, P. C. 953. And see 2 Russ. on Crimes, 344, 353–355.

[6] Commonwealth *v.* Ladd, 15 Mass. 526; The State *v.* Washington, 1 Bay, 120; Rex *v.* Ward, 2 Ld. Raym. 1461, 1469. In Scotland, the law is otherwise; the crime of forgery not being complete, unless the forged instrument be uttered or put to use. Alison's Crim. Law of Scotland, p. 401, ch. 15, § 19. [Under the act of the United States against counterfeiting, it is no offence to counterfeit the coin of the country for any other purpose than to pass it as genuine, even if the purpose for which it is intended be morally indefensible. United States *v.* King, 5 McLean, 208.] [* Counterfeiting the current coin of the United States is an offence punishable in a State court, in the absence of any statutes of the United States forbidding such punishment. State *v.* McPherson, 9 Iowa, 53.]

[7] [But see Regina *v.* Hodgson, 36 Eng. Law & Eq. R. 626.]

[8] Regina *v.* Marcus, 2 Car. & Kir. 358, 361; Regina *v.* Hoatson, 2 Car. & Kir. 777. See Regina *v.* Nash, 2 Denison, C. C. 499, 503; 12 Eng. Law & Eq. R. 578; 16 Jur. 553; 21 Law J. Rep. (N. S.), M. C. 147. [* In The People *v.* Krummer, 4 Parker, C. R. (N. Y.) 217, it is held that it is not necessary, in order to constitute forgery of an instrument, that the party in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it if genuine, or have a remedy over. It is the felonious making and uttering of a false instrument as true in fact, which constitutes the crime.]

An intent to defraud the person, who would be liable to discharge the obligation if genuine, is to be inferred by the Jury, although, from the manner of executing the forgery, or other circumstance, that person would not be likely to be imposed upon, and although the prisoner's actual intent was to defraud whoever he might defraud.[1] Uttering a forged paper, knowing it to be such, with intent to defraud, is also an act of forgery, punishable by the common law;[2] provided some fraud be actually perpetrated by it.[3]

§ 104. The *usual form of charging* this offence in the indictment is, that the defendant "feloniously and falsely did make, forge, and counterfeit" the writing described, "with intent one A. B. to defraud."[4] But in the *proof of the charge* it is not necessary to show that the *entire* instrument is fictitious. The allegation may be proved by evidence of a fraudulent insertion, alteration, or erasure in any material part of a true writing, whereby another may be defrauded.[5] And where the evidence was, that the defendant, having a number of bank-notes of the same bank and the same denomination, took a strip perpendicularly out from a different part of each note, with intent out of these parts to form an additional note, the Court seemed inclined to think that the act, if completed, would amount to forgery.[6] So, in an indictment for

[1] Rex *v.* Mazagora, Bayley on Bills, 613; Russ. & Ry. 291; [Commonwealth *v.* Stevenson, 11 Cush. 481.]

[2] Commonwealth *v.* Searle, 2 Binn. 332. As to what constitutes forgery, see 2 Russ. on Crimes, 318–361, where the subject is amply treated. [* The alteration or the false entry of a sum in a merchant's journal by a confidential clerk, or bookkeeper, with intent to defraud, is forgery at common law. Biles *v.* Commonwealth, 32 Penn. St. R. 529. Where the defendant wrote a promissory note for $141.26, and read it to another who was unable to read, as a note for $41.26, and induced him to sign it as maker, it was held that this did not constitute forgery. Commonwealth *v.* Sankey, 22 Penn. St. R. 390. But it *seems* that it is forgery for one to whom a blank acceptance is intrusted, to fill up the blank by inserting a sum greater than he is authorized to insert. Van Duzer *v.* Howe, 21 N. Y. 531.]

[3] Regina *v.* Boult, 2 Car. & Kir. 604. It is *not* necessary that some fraud be actually perpetrated. In Regina *v.* Sharman, 18 Jur. 157; 6 Cox, C. C. 312; 24 Eng. Law & Eq. R. 553, the prisoner was indicted for forging a testimonial to his character as a schoolmaster, and other counts of the indictment charged him with having uttered the forged document. The Jury acquitted him of the forgery, but found him guilty of the uttering, with intent to obtain the emoluments of the place of schoolmaster, and to deceive the prosecutor. On a case reserved, it was held, that this finding of the Jury amounted to an offence at common law, of which the prisoner was properly convicted. But Williams, J., remarked that Regina *v.* Boult had created some doubt in his mind.

[4] [* There is no duplicity in an indictment in alleging that the respondent forged and caused to be forged, and aided and assisted in forging, — they being, in legal contemplation, the same act. State *v.* Morton, 27 Vt. 310.]

[5] 1 Hale, P. C. 683–685; 1 Hawk. P. C. ch. 70, § 2; 2 Russ. on Crimes, 319–360; 3 Chitty, Crim. Law, 1038; Commonwealth *v.* Ladd, 15 Mass. 526; Rex *v.* Atkinson, 7 C. & P. 669; Rex *v.* Teague, Russ. & Ry. 33; 2 East, P. C. 979; Rex *v.* Elsworth, 2 East, P. C. 986, 988; Rex *v.* Post, Russ. & Ry. C. C. 101; Rex *v.* Treble, Russ. & Ry. C. C. 164; 2 Taunt. 328.

[6] Commonwealth *v.* Haywood, 10 Mass. 34. And see the Rev. Sts. of Mass. ch.

uttering a forged stamp, where the evidence was that the defendant, having engraved a counterfeit stamp, in some parts similar, and in others dissimilar to the genuine stamp, cut out the dissimilar part of the stamp, and united the dissevered parts together, covering the deficiency by a waxen seal upon it, the proof was held sufficient to support an indictment for forging the stamp.[1] If the evidence be that the act was done by several persons, either by employing another to commit the deed,[2] or by each one separately performing a distinct essential part of it, as, for example, if it be the forgery of a bank-note, one engraving the plate, and others writing the signatures of the several officers, proof of the part performed by the prisoner is sufficient to support an indictment against him alone, as the sole forger of the instrument; though he does not know who performed the other parts.[3]

§ 105. It must appear that the instrument, on its face, had such *resemblance to the true instrument* described, as to be calculated to deceive persons of ordinary observation; though it might not deceive experts, or persons more than ordinarily acquainted with the subject.[4] The want of such appearance on the face of the paper cannot be supplied by evidence of any declarations or representations, made by the party charged, at the time when he uttered and passed it as true; as, for example, if it be a fabricated bank-note, but not purporting to be signed;[5] or a will, not having the number of witnesses expressly required by statute, in order to its validity.[6] But a mere literal mistake, such as a blunder in the spelling of a name will not make any difference; it being sufficient to constitute the crime, if a signed writing, which is forged, be intended to be taken as true, and might so be taken by ordinary persons.[7]

127, § 12. [See Regina *v.* Keith, 29 Eng. Law & Eq. R. 558.]

[1] Rex *v.* Collicott, 4 Taunt. 300.

[2] Regina *v.* Mazean, 9 C. & P. 676.

[3] Rex *v.* Kirkwood, 1 Moody, C. C. 304; Rex *v.* Dade, Id. 307; Rex *v.* Bingley, Russ. & Ry. 446. If one part of a machine for counterfeiting bank-notes is found in the prisoner's possession, evidence is admissible to show that other parts were found in the possession of other persons, with whom he was connected in the general transaction. United States *v.* Craig, 4 Wash. 729. See Commonwealth *v.* Ray, 3 Gray, 441.

[4] 2 Russ. on Crimes, 344; Archbold, Crim. Pl. (London ed. 1853), 453; Rex *v.* McIntosh, 2 East, P. C. 942; Id. 950; Rex *v.* Elliot, 1 Leach, C. C. (4th ed.), 175; United States *v.* Morrow, 4 Wash. 733. [The same rule applies to counterfeiting coins. United States *v.* Burns, 5 McLean, 23.]

[5] Rex *v.* Jones, 1 Doug. 300; 1 Leach, C. C. (4th ed.), 204; [Regina *v.* Keith, 29 Eng. Law & Eq. R. 558.]

[6] Rex *v.* Wall, 2 East, P. C. 953. And see Rex *v.* Moffat, 1 Leach, C. C. (4th ed.), 431.

[7] 2 Russ. on Crimes, 348–350; Rex *v.* Fitzgerald, 1 Leach, C. C. (4th ed.), 20; 2 East, P. C. 953; Alison's Crim. Law of Scotland, ch. 15, § 1, p. 371.

§ 106. The proof that the *writing is false and counterfeit* may be made by the evidence of any person acquainted with the handwriting of the party whose autograph it is pretended to be, or by comparing it with genuine writings or signatures of the party, in the mode and under the limitations stated in a preceding volume.[1] And it is now well settled, that the person whose signature or writing is said to be forged, is a competent witness, in a criminal trial, to prove the forgery;[2] but he is not an indispensable witness, his testimony not being the *best* evidence which the nature of the case admits, though it is *as good* as any, and might, in most cases, be more satisfactory than any other.[3] If the crime consists of the prisoner's fraudulently writing his own acceptance on a forged bill of exchange, evidence that, when the bill was shown to him in order to ascertain whether it was a good bill, he answered that it was very good, is admissible to the Jury, and is sufficient ground for a verdict of conviction.[4]

§ 107. If the *writing said to be forged* is in existence, and accessible, it *must be produced at the trial.* But its absence, if it be proved to be in the prisoner's possession, or to have been destroyed

[1] For the proofs of handwriting, see *ante*, Vol. 1, § 576, 581; Commonwealth *v.* Smith, 6 S. & R. 568; The State *v.* Lawrence, Brayt. 78; The State *v.* Carr, 5 N. Hamp. 367; Martin's case, 2 Leigh, 745; Commonwealth *v.* Carey, 2 Pick. 47; The State *v.* Ravelin, 1 D. Chipm. (Vt.) R. 295; The State *v.* Candler, 3 Hawks, 393; Watson *v.* Cresap, 1 B. Monr. 195; Foulker's case, 2 Rob. (Va.) 836; [Keith *v.* Lothrop, 10 Cush. 453.] [* Where the prisoner, being suspected on discovery of the forgery, was asked to write his name for the purpose of comparison, and did so, it was held that this signature was inadmissible on the part of the prosecution for that purpose. Reg. *v.* Aldridge, 3 F. & F. 781.]

[2] *Ante*, Vol. 1, § 414; Commonwealth *v.* Peck, 1 Met. 428. But in the examination of such witness, it is deemed improper to conceal from him all the writing except the signature; and it is held, that he is not bound to answer whether the signature is *in fact* his, without first seeing the entire paper. Commonwealth *v.* Whitney, Thach. C. C. 588. In the examination of experts, however, and of other persons testifying their *opinions*, it is not unusual to conceal all but the signature. The reason for this difference is obvious. The party, called to testify to a fact, upon his own knowledge, is entitled to all the means of arriving at certainty; but the *opinions* of other persons as to the genuineness of a signature ought to be founded on the signature alone, unbiassed by any collateral circumstances.

[3] 2 Russ. on Crimes, 392; Rex *v.* Hughes, 2 East, P. C. 1002. In the Scotch law, the oath of the party, whose signature is said to be forged, is considered the *best* evidence of the forgery. Other evidence is estimated in the following order: — 1, that of persons acquainted with his handwriting, and who have seen him write; — 2, that of persons who have corresponded with him, without having seen him write; — 3, a *comparatio literarum* with his genuine writings; — 4, that of experts, or persons accustomed to compare the similitude of handwriting. See Alison's Crim. Law of Scotland, ch. 15, § 24, p. 412. But in England and the United States, in these different kinds of evidence, there is no *legal* preference of one before another, however differently they may be valued by the Jury. See *ante*, Vol. 1, § 84, 576 – 581. [* Upon a trial for forgery, testimony that the respondent had offered and used, in support of the instrument alleged to be forged, a false and fictitious deposition, which was obtained by his personating the apparent deponent, is admissible as tending to show his guilt. State *v.* Williams, 27 Vt. 726.]

[4] Rex *v.* Hevey, 1 Leach, C. C. (4th ed.), 232.

by him, or otherwise destroyed without the fault of the prosecutor, is no legal bar to proceeding in the trial, though it may increase the difficulty of proving the crime.[1] Thus, where the forged deed was in possession of the prisoner, who refused to produce it, it was held that the Grand Jury might receive *secondary evidence* of its contents, and, if thereupon satisfied of the fact, might return a true bill; and that, on the trial of the indictment, the like evidence was admissible.[2] But before secondary evidence can be received of the contents of the forged paper, in the prisoner's possession, due *notice must be given to the prisoner to produce it*, unless it clearly appears that he has destroyed it.[3]

§ 108. The writing, when produced or proved, must agree in all essential respects with the description of it in the indictment; a material *variance*, as we have heretofore seen, being fatal.[4]

[1] Such is also the law of Scotland. Alison's Crim. Law, p. 409, ch. 15, § 22.

[2] Rex *v.* Hunter, 3 C. & P. 591; 4 C. & P. 128, S. C. In the latter case, it was held, that if the paper was in the hands of the prisoner's counsel or attorney, it was the duty of the latter not to produce it, but to deliver it up to his client. See also Rex *v.* Dixon, 3 Burr. 1687; Anon. 8 Mass. 370; Dwyer *v.* Collins, 12 Eng. Law & Eq. R. 532.

[3] 2 Russ. on Crimes, 743 – 745 (3d ed.); Rex *v.* Haworth, 4 C. & P. 254; The State *v.* Potts, 4 Halst. 26; United States *v.* Britton, 2 Mason, 464, 468; Rex *v.* Spragge, cited 14 East, 276. See The United States *v.* Doebler, Baldwin, 519, 522, *contra*. As to the time and manner of giving notice, and when notice is necessary, see *ante*, Vol. 1, § 560 – 563. If the fact of the destruction of the instrument is not clearly proved, and is denied by the prisoner, notice to produce it will not be dispensed with. Doe *v.* Morris, 3 Ad. & El. 46.

[4] See *ante*, Vol. 1, § 63 – 70; The State *v.* Handy, 20 Maine, 81; Commonwealth *v.* Adams, 7 Met. 50. Thus, if the indictment charge the forgery of "a certain *warrant and order* for the payment of money," it is not supported by proof of the forgery of a *warrant* for the payment of money, which is not also an *order*. Regina *v.* Williams, 2 Car. & Kir. 51. But in a very recent English case, it has been held, that if the instrument be set out in *hæc verba*, a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable. In this case, Parke, B., said: "The question may be very different if the indictment sets out the instrument, from what it would be if it merely described it in the terms of the statute. In the former case, the matter, which it is contended is descriptive, may be mere surplusage, for when the instrument is set out on the record, the Court are enabled to determine its character, and so a description is needless. Regina *v.* Williams, 2 Denison, C. C. 61; 1 Temple & Mew. C. C. 382; 4 Cox, C. C. 256; 2 Eng. Law & Eq. R. 533 (1850). In this case the indictment charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," etc. It was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request. But it was held, that there was no variance, as the document, being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been, to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says Denison, "that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the Court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the Court to treat as material only the tenor of the indictment itself, all the descriptive averments may be treated as surplusage. The principal case seems reconcilable with Regina *v.* Newton, 2 Moody, C. C. 59, but to overrule Regina *v.* Williams, 2 Car. & Kir.

§ 109. If the prisoner, on uttering a forged note made payable to himself, *represent* the maker as being at a particular place, and engaged in a particular business, evidence that it is not *that* person's note is sufficient *primâ facie* proof of the forgery; for the prisoner, being the payee of the note, must have known who was the maker. And if it should appear that there is another person of the same name, but engaged in a different business, it will not be necessary for the prosecutor to show that it was not this person's note; it being incumbent on the prisoner to prove that it is the genuine note of such other person.[1] So, where the prisoner obtained money from a person, for a check drawn upon G. A. upon a certain banking house, and it appeared that no person of that name kept an account, or had funds or credit in that house, this was held sufficient *primâ facie* evidence that G. A. was a fictitious person until the prisoner should produce him, or give other sufficient explanatory proof to the contrary.[2] Where inquiries are to be made in regard to the residence or existence of any supposed party to a forged instrument, it is proper and usual to call the police officers, penny-postman, or other persons well acquainted with the place and its inhabitants; but if inquiries have been made in the place by a stranger, his testimony, as to the fact and its results, is admissible to the Jury, though it may not be satisfactory proof of the non-existence of the person in question.[3] If the forgery be by executing an instrument in a fictitious name, for the purpose of defrauding, the prosecutor must show that the fictitious name was assumed for the purpose of defrauding in that particular instance; it will not be sufficient to prove that it was assumed for general purposes of concealment and fraud, unless it appears that the particular forgery in question was part of the general purpose.[4] And if there be proof of the prisoner's real name, the burden is on him

51." In Regina *v.* Charretie, 3 Cox, C. C. 503 (1849), Davison, *amicus curiæ*, mentioned that Cresswell, J., in a subsequent case, had declined to act upon the authority of Regina *v.* Williams, 2 Car. & Kir. 51. And see Commonwealth *v.* Wright, 1 Leading Crim. Cases, 319. [In an indictment for uttering a forged bank-bill, it is not necessary to set forth those parts of the bill which are merely repetitions of the essential parts of the contract, such as figures and words in the margin, or only serve as check marks for the benefit of the bank officers. Commonwealth *v.* Bailey, 1 Mass. 62; Commonwealth *v.* Stevens, Ib. 203; Commonwealth *v.* Taylor, 5 Cush. 605. But the name of the State to which the bank belongs, inserted in the margin of the note and not repeated in its body, is part of its date, and therefore of the contract, and the omission of it in the indictment is a fatal variance. Commonwealth *v.* Wilson, 2 Gray, 70.]

[1] Rex *v.* Hampton, 1 Moody, C. C. 255.

[2] Rex *v.* Backler, 5 C. & P. 118. And see Rex *v.* Brannan, 6 C. & P. 326.

[3] Rex *v.* King, 5 C. & P. 123.

[4] Rex *v.* Bontien, Russ. & Ry. C. C. 260.

to prove, that he used the assumed name, before the time when he contemplated the particular fraud.[1]

§ 110. The allegation of *uttering and publishing* is proved by evidence that the prisoner *offered* to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was *good*.[2] The act of *passing* is not complete until the instrument is received by the person to whom it is offered.[3] If the instrument is uttered, through the medium of an innocent agent, this is proof of an uttering by the employer;[4] and this principle seems equally applicable to the case of uttering by means of a guilty agent.[5] If the instrument be delivered *conditionally*, as, for example, to stand as collateral security, if, upon inquiry, it be found satisfactory, this is sufficient proof of uttering it.[6] But if it be given as a specimen of the forger's skill;[7] or be exhibited with intent to raise a false belief of the exhibitor's property or credit, though it be afterwards left with the other party, sealed in an envelope, to be kept safely, as too valuable to be carried about the person; this is not sufficient evidence to support the allegation of uttering.[8] The offence of uttering forged bank-notes is committed, although the person to whom the notes were delivered is the agent of the bank, employed for the purpose of detecting persons guilty of forging its notes, but representing himself to the prisoner as a purchaser of such spurious paper.[9]

§ 111. In proof of the criminal uttering of a forged instrument,

[1] Rex *v.* Peacock; Russ. & Ry. C. C. 278.

[2] Commonwealth *v.* Searle, 2 Binn. 399, per Tilghman, C. J. And see The United States *v.* Mitchell, Baldwin, 367; Rex *v.* Shukard, Russ. & Ry. C. C. 200.

[3] Ibid. The word "pass," as applied to bank-notes, is technical, and means to deliver them as money, or as a known and conventional substitute for money. Hopkins *v.* The Commonwealth, 3 Met. 464, per Shaw, C. J.

[4] Commonwealth *v.* Hill, 11 Mass. 136; Foster, C. L. Disc. 3, ch. 1, § 3, p. 349; [Regina *v.* Fitchie, 1 Dears. & Bell, 175; 40 Eng. Law & Eq. R. 598.]

[5] Rex *v.* Giles, 1 Moody, C. C. 166; Rex *v.* Palmer, 1 New Rep. 96; The United States *v.* Morrow, 4 Wash. 733.

[6] Regina *v.* Cooke, 8 C. & P. 582.

[7] Rex *v.* Harris, 7 C. & P. 428.

[8] Rex *v.* Shukard, Russ. & Ry. C. C. 200; Bayley on Bills, 609.

[9] Rex *v.* Holden, 2 Taunt. 334; Russ. & Ry. C. C. 154; 2 Leach, C. C. (4th ed.) 1019. But the showing a forged *receipt* to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering within the statute 1 W. 4, ch. 66, § 10, although the defendant refused to part with the possession of it. Regina *v.* Radford, 1 Denison, C C. 59; 1 Leading Crim. Cases, 397; 1 Car. & Kir. 707; 1 Cox, C. C. 168. And where the defendant placed a forged receipt for poor rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor rates, fraudulently to induce the prosecutor to advance money to a third person, for whom the defendant proposed to become a surety for its repayment; this was held an uttering within the statute 1 W. 4, ch. 66, § 10; Regina *v.* Ion, 16 Jur. 746; 1 Leading Crim. Cases, 400; 2 Denison, C. C. 475; 6 Cox, C. C. 1; 14 Eng. Law & Eq. R. 556. The rule there laid down is, that a using of the forged instrument in some way in order to get money or credit upon it, *or by means of it*, is sufficient to constitute the offence described in the statute.

it is essential to prove *guilty knowledge* on the part of the utterer. And to show this fact, evidence is admissible that he had about the same time uttered, or attempted to utter, other forged instruments, of the same description ;[1] or, that he had such others, or instruments for manufacturing them, in his possession ;[2] or, that he pointed out the place where such others were by him concealed ;[3] or, that at other utterings of the same sort of papers, he assumed different names ;[4] or that he uttered the paper in question under false representations made at the time, or the like.[5] But where such other instruments, said to be forged, are offered in proof of guilty knowledge, there must be strict proof that they are forgeries.[6] And when evidence is given of other utterings, in order to show guilty knowledge in the principal case, the evidence must be confined to the fact of the prisoner's having uttered such forged instruments, and to his conduct at the time of uttering them ; it being improper to give evidence of what he said or did at any other time, collateral to such other utterings, as the prisoner could not be prepared to meet it.[7]

[1] Rex *v.* Wylie, 1 New Rep. 92 ; 1 Leading Crim. Cases, 185 ; Rex *v.* Ball, 1 Camp. 324 ; *Supra*, § 15 ; The United States *v.* Roudenbush, Baldwin, 514 ; The United States *v.* Doebler, Id. 519 ; The State *v.* Antonio, Const. Rep. (S. C.) 776. See Alison's Crim. Law of Scotland, ch. 15, § 28, p. 419-422, where the circumstances evincing guilty knowledge are more amply detailed. See also Regina *v.* Oddy, 5 Cox, C. C. 210 ; [McCartney *v.* State, 3 Ind. 353. Evidence that soon after the prisoner's arrest similar forgeries were found in the pockets of his wife, without other proof of concert between them, is held inadmissible. People *v.* Thoms, 3 Parker, C. R. 256.] [* In Reg. *v.* Salt, 3 F. & F. 834, it is said to be impossible to lay down any general rule as to the time within which such previous uttering must have taken place to be admissible.]

[2] Rex *v.* Hough, Russ. & Ry. C. C. 120 ; Commonwealth *v.* Stone, 4 Met. 43 ; Bayley on Bills, 617. Proof of the possession, at the same time, of other forged instruments, of a different description, has been admitted. Sunderland's case, 1 Lewin, C. C. 102 ; Kirkwood's case, Id. 103 ; Martin's case, Id. 104 ; Rex *v.* Crocker, 2 New Rep. 87, 95 ; Hess *v.* The State, 5 Ham. 5 ; Hendrick's case, 5 Leigh, 707 ; The State *v.* McAllister, 24 Maine, 139 ; [United States *v.* Burns, 5 McLean, 23 ; United States *v.* King, Id. 208.] See *supra*, § 15.

[3] Rex *v.* Rowley, Russ. & Ry. C. C. 110 ; Bayley on Bills, 618.

[4] Rex *v.* Millard, Russ. & Ry. C. C. 245 ; Bayley on Bills, 619 ; Rex *v.* Ward, Id.

[5] Rex *v.* Sheppard, Russ. & Ry. C. C. 169 ; 1 Leach, C. C. (4th ed.) 226 ; 2 East, P. C. 697. And see The State *v.* Smith, 5 Day, 175. On the trial of two persons for the joint possession of counterfeit bank-notes with intent to utter them, it is competent to show that one of them, at another time and place, had other counterfeit notes in his possession, in order to prove his guilty knowledge. Commonwealth *v.* Woodbury, Thach. Crim. Cas. 47. [So, also, guilty knowledge may be inferred from the fact that the prisoner had a large quantity of counterfeit coin in his possession, many pieces being of the same sort, of the same date, and made in the same mould, each piece being wrapped in a separate piece of paper, and the whole being distributed in different pockets of the dress. Regina *v.* Jarvis, 33 Eng. Law & Eq. Rep. 567.]

[6] Rex *v.* Forbes, 7 C. & P. 224. And see Rex *v.* Millard, Russ. & Ry. C. C. 245. See also State *v.* Williams, 27 Verm. 724.

[7] Phillip's case, 1 Lewin, C. C. 105 ; The State *v.* Van Hereten, 2 Penn. 672 ; Commonwealth *v.* Bigelow, 8 Met. 235. And see *ante*, Vol. 1, § 52, 53 ; Rex *v.* Forbes, 7 C & P. 224 ; Regina *v.* Cooke, 8 C. & P. 586. In Regina *v.* Butler, 2 C. & K. 221, evidence of what the prisoner

§ 111 *a*. It is now the settled law of England, that this species of evidence may be admitted to prove the *scienter* in trials for forgery, uttering, or having in possession, false notes, bills of exchange, or bank-bills, of all descriptions, if previous to the principal charge.[1] The same doctrine is applied to the crime of uttering counterfeit coin.[2] In America, this exception in the law of evidence has been adopted, both in practice and by authority.[3] This kind of evidence has been extended to proof of the *scienter* on the trial of an indictment for falsely representing the bill of an insolvent bank as good, and thereby obtaining property with intent to defraud.[4]]

said about money of the prosecutor, found in his possession at the time of his arrest, *other* than that for which he was indicted, was held not to be competent, and the case may thus be reconciled. If such other utterings are the subject of distinct indictments, the evidence will not on *that* account be rejected. Commonwealth *v.* Stearns, 10 Met. 256; Regina *v.* Ashton, 2 Russ. on Crimes, 406, 407, per Anderson, B.; Regina *v.* Lewis, Archb. Crim. Pl. (London ed. 1853), per Ld. Denman. In Rex *v.* T. Smith, 2 C. & P. 633, such evidence was rejected by Vaughan, B. But in Rex *v.* F. Smith, 4 C. & P. 411, Gaselee, J., after consulting the Ld. Ch. Baron, and referring to Russell, as above cited, was disposed to admit it. See acc. The State *v.* Twitty, 2 Hawks, 248; Commonwealth *v.* Percival, Thach. Crim. Cas. 293.

[1] Rex *v.* Wiley, 1 Leading Crim. Cases, 189; Regina *v.* Nisbett, 6 Cox, C. C. 320; Rex *v.* Taverner, 4 C. & P., note, is an authority that the subsequent utterings cannot be given in evidence, unless competent on other grounds. But see Rex *v.* Smith, 2 C. & P. 633. [* It was held, in Bluff *v.* State, 10 Ohio (N. S.), 547, that, under an indictment for having counterfeit notes with guilty intent, the State cannot be allowed to prove the prisoner's possession of material and appliances for making counterfeit coin, in order to prove a scienter or an intent to utter. And in Lane *v.* State, 16 Ind. 14, *quære*, whether, on trial for passing counterfeit gold coin, evidence that defendant had in his possession, and attempted to secrete, counterfeit bank-notes, is admissible to prove scienter.]

[2] Harrison's case, 2 Lewin, C. C. 118; Regina *v.* Foster, 6 Cox, C. C.; 29 Eng. Law & Eq. R. 548; The Monthly Law Reporter, Vol. 8, N. S. 404. [* Under an indictment for counterfeiting coin, proof of intent to pass it is not essential; it is presumed, until the contrary is shown. State *v.* McPherson, 9 Iowa, 53.]

[3] Commonwealth *v.* Bigelow, 8 Met. 235; Commonwealth *v.* Stearns, 10 Met. 256; The State *v.* McAllister, 24 Maine, 139; Commonwealth *v.* Turner, 3 Met. 19; The United States *v.* Roudenbush, Baldwin, 514; The State *v.* Antonio, 2 Const. Rep. 776.

[4] Commonwealth *v.* Stone, 4 Met. 43, 47. The Court said that the case is strictly analogous to the rule in relation to proof of the *scienter* on a charge of passing counterfeit bills or coins, which is well established here and in England. In Regina *v.* Oddy, 5 Cox, C. C. 210; 2 Denison, C. C. 264; 4 Eng. Law & Eq. R. 572; Lord Campbell, C. J., said: "I am of opinion that the evidence objected to was as admissible under the first two counts as it was under the third, for it was evidence that went to show that the prisoner was a very bad man, and a likely person to commit such offences as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. The evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen at the time that he received them. The rule which has prevailed in the case of indictments for uttering forged bank-notes, of allowing evidence to be given of the uttering of other forged notes to different persons, has gone to great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of opinion that the evidence admitted in this case, with regard to the *scienter*, was improperly admitted, as it afforded no ground for any legitimate inference in respect to it. The conviction,

§ 112. To show *the place where the forgery was committed*, it is competent to prove that the instrument was found in the prisoner's possession in such place, and that he resided there; of the sufficiency of which the Jury will judge.[1] And if the instrument bears date at a certain place, and it is proved that the prisoner was there at that time, this is sufficient evidence that it was made at that place.[2] But where a forged instrument was found in the prisoner's possession at W., where he then resided, but it bore date at S., at a previous time, when he dwelt in the latter place, this was held not to be sufficient evidence of the commission of the offence in W.[3] If the instrument is not dated at any place, and the fact of forgery by the prisoner is proved, and that he uttered, or attempted to utter it at the place named in the indictment, this is evidence that it was forged at that place.[4] If a letter, containing a forged instrument, be put into the post-office, this is not evidence of an uttering at that place; but the venue must be laid in the place where the letter was received.[5]

§ 113. If the indictment be for uttering a forged bank-note, *parol evidence* is admissible to show that the person, whose name appears on the note as president, is in fact the president of that bank;[6] but it is not necessary to prove the existence of the bank, unless it be described in the indictment as a bank duly incorporated, or an intent to defraud that bank be alleged.[7]

therefore, must be quashed. And see Regina *v.* Green, 3 Car. & Kir. 209." [Where several persons were indicted for forging a check on a bank, it was held admissible to prove that previous to presenting the check the respondents had agreed to procure money by means of forged papers, without reference to any particular bank. State *v.* Morton, 27 Verm. 310.]

[1] Rex *v.* Crocker, 2 New Rep. 87; Russ. & Ry. C. C. 97; Spencer's case, 2 Leigh, 751.

[2] The State *v.* Jones, 1 McMullan, 236.

[3] Rex *v.* Crocker, 2 New Rep. 87; Russ. & Ry. C. C. 97.

[4] Bland *v.* The People, 3 Scam. 364.

[5] The People *v.* Rathbun, 21 Wend. 509, 527 – 541, where all the cases, English and American, on this point, are collected and fully reviewed. The principle, on which this point was decided is, that the offence charged was a felony, to which the act of consummation was indispensably necessary; the *attempt* to commit a felony being of itself, and without consummation, only a misdemeanor. But where an act of forgery amounts only to a misdemeanor, as the attempt to commit it is of itself a misdemeanor, it is conceived that proof of putting a letter, containing the false instrument, into the post-office, would be sufficient to support a charge of committing the crime at that place. See Perkins's case, Lewin, C. C. 150; *Supra*, § 2.

[6] The State *v.* Smith, 5 Day, 175.

[7] Commonwealth *v.* Smith, 6 S. & R. 568; The People *v.* Peabody, 25 Wend. 473.

# HOMICIDE.

[* § 114. Homicide defined.
115. Justifiable homicide, of three classes.
116. Excusable, of two classes.
117. Homicide necessarily committed in defence of possession of one's dwelling-house, excusable.
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119. Felonious homicide, either manslaughter or murder.
120. Indictment for manslaughter, how differs from one for murder.
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123. Killing an officer executing illegal or defective process, manslaughter.
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134. Death by suicide, accident, or natural cause, must be excluded by circumstances proved.
135. In case of death by poisoning, proof of particular poison not requisite.
136. Proof of birth of child alive necessary to support charge of infanticide.
137. Circumstances showing that prisoner was guilty agent.
138. Deed of murder need not be committed immediately by his own hand.
139. Mismanagement of wound not mortal in its nature, but given in malice, no excuse.
140. Mode of killing not material.
141. Proof that death was accelerated by an artificial cause does not sustain charge of death proceeding from that cause.
142. Forcing a person to do an act which causes his death, a killing.
143. Must be proved that crime was committed in county where trial is had.
144. Proof of malice aforethought indispensable.
145. Malice either express or implied.
146. Malice presumed where officer of justice is resisted and killed in execution of his office

§ 147. Gross recklessness of human life proof of malice.
148. Drunkenness, not an excuse for act which is its immediate result.
149. Prisoner's account of act, related immediately after it happened, admissible as part of *res gestæ*.]

§ 114. HOMICIDE is "*the killing of any human being.*" It is of *three kinds* : — 1. *Justifiable* ; — 2. *Excusable* ; — 3. *Felonious.*

§ 115. 1. *Justifiable homicide* is that which is committed either, 1st, by *unavoidable necessity*, without any will, intention, or desire, or any inadvertence or negligence in the party killing, and therefore without blame ; such as, by an officer, executing a criminal, pursuant to the death-warrant, and in strict conformity to the law, in every particular ; — or, 2dly, for the *advancement of public justice* ; as, where an officer, in the due execution of his office, kills a person who assaults and resists him ; or, where a private person or officer attempts to arrest a man *charged* with felony and is resisted, and in the endeavor to take him, kills him ; or, if a felon flee from justice, and in the pursuit he be killed, where he cannot otherwise be taken ; or, if there be a riot, or a rebellious assembly, and the officers or their assistants, in dispersing the mob, kill some of them, where the riot cannot otherwise be suppressed ; or, if prisoners, in jail, or going to jail, assault or resist the officers, while in the necessary discharge of their duty, and the officers or their aids, in repelling force by force, kill the party resisting ; — or, 3dly, for the *prevention of any atrocious crime*, attempted to be committed by force ; such as murder, robbery, housebreaking in the night-time, rape, mayhem, or any other act of felony against the person.[1] But in such cases the attempt must be not merely suspected, but apparent, the danger must be imminent, and the opposing force or resistance necessary to avert the danger or defeat the attempt.[2]

§ 116. 2. *Excusable homicide* is that which is committed either, 1st, *by misadventure* ; (*per infortunium* ;) which is where one,

[1] 4 Bl. Comm. 178 – 180 ; 1 Russ. on Crimes, 665 – 670 ; Wharton's Amer. Crim Law, 298 – 403. The Roman civil law recognized the same principles. Qui latronem (insidiatorem) occiderit, non tenetur, utique si aliter periculum effugere non potest. Inst. lib. 4, tit. 3, § 2. Furem nocturnum si quis occiderit, ita demum impunè foret, si parcere ei sine periculo suo non potuit. Dig. lib. 48, tit. 8, l. 9. Qui stuprum sibi vel suis per vim inferentem occidit, dimittendus. Dig. lib. 48, tit. 8, l. 1, § 4. Si quis percussorem ad se venientem gladio repulerit, non ut homicida tenetur ; quia defensor propriæ salutis in nullo peccasse videtur. Cod. lib. 9, tit. 16, l. 3. In the cases mentioned in the text, if the homicide is committed with undue precipitancy, or the unjustifiable use of a deadly weapon, the slayer will be culpable. See Alison's Crim. Law of Scotland, p. 100 ; Id. p. 132 – 139.

[2] United States *v.* Wiltberger, 3 Wash. 515. And see The State *v.* Rutherford, 1 Hawks, 457 ; The State *v.* Roane, 2 Dev. 58.

doing a *lawful* act, unfortunately kills another; as, if he be at work with a hatchet, and the head thereof flies off and kills a by-stander; or if a parent is correcting his child, or a master his apprentice or scholar, the bounds of moderation not being exceeded, either in the manner, the instrument, or the quantity of punishment; or if an officer is punishing a criminal, within the like bounds of moderation, or within the limits of the law, and in either of these cases, death ensues;[1] or, 2dly, in *self-defence;* (*se defendendo;*) which is where one is assaulted, upon a sudden affray, and in the defence of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant. To reduce homicide in self-defence to this degree, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. The Jury must be satisfied that, unless he had killed the assailant, he was in imminent and manifest danger either of losing his own life, or of suffering enormous bodily harm.[2] This latter kind of homicide is sometimes called *chance-medley*, or *chaud-medley*, words of nearly the same import; and closely borders upon manslaughter. In both cases it is supposed that passion has kindled on each side, and that blows have passed between the parties; but the difference lies in this, — that in manslaughter, it must appear, either that the parties were actually in mutual combat when the mortal stroke was given, or, that the slayer was not at that time in imminent danger of death; but that in homicide excusable by self-defence it must appear, either that the slayer

[1] 4 Bl. Comm. 182; 1 Russ. on Crimes, 657 - 660.

[2] 4 Bl. Comm. 182; 1 Russ. on Crimes, 660, 661; Wharton's Am. Crim. Law, 385 - 397. Qui, cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt. Vim enim vi defendere, omnes leges omniaque jura permittant. Dig. lib. 9, tit. 2, l. 45, § 4. Is, qui aggressorem vel quemcunque alium in dubio vitæ discrimine constitutus occiderit, nullam ob id factum calumniam metuere debet. Cod. lib. 9, tit. 16, l. 2. [The law does not demand of the accused the same deliberate judgment which the Jury can exercise in reviewing the circumstances of the killing; but only that he should have actually and reasonably believed that the only way to protect himself from immediate danger was to kill his adversary. United States *v.* Mingo, 2 Curt. C. C. 1.] [* The benefit of a doubt whether the homicide is justifiable or not is to be given to the prisoner. People *v.* Arnold, 15 Cal. 476. See also People *v.* Gibson, 17 Cal. 283. It is the duty of the court, upon common principles of humanity and justice, first, to pronounce the criminal innocent until he is proved guilty; and, secondly, after he is shown to have committed a homicide, to look for every excuse which may reduce the guilt to the lowest point consistent with the facts proved. State *v.* McDonnell, 32 Vt. 538. But an expert's doubts as to a defendant's sanity are not legal proof of his insanity, and therefore are inadmissible. Sanchez *v.* People, 22 N. Y. 147.]

had not begun to fight, or that, having begun, he endeavored to decline any further struggle, and afterwards, being closely pressed by his antagonist, he killed him to avoid his own destruction.[1] Under this excuse of self-defence, the principal civil and natural relations are comprehended ; and therefore, a master and servant, parent and child, and husband and wife, killing an assailant, in the necessary defence of each other respectively, are excused.[2]

§ 117. Homicide is also excusable, when unavoidably committed in *defence of the possession of one's dwelling-house*, against a trespasser, who, having entered, cannot be put out otherwise than by force ; and no more force is used, and no other instrument or mode is employed, than is necessary and proper for that purpose.[3] So, if in a common calamity, two persons are reduced to the dire alternative, that one or the other or both must certainly perish, as, where two shipwrecked persons are on one plank, which will not hold them both, and one thrusts the other from it, so that he is drowned, the survivor is excused.[4]

§ 118. The *distinction* between justifiable and excusable homicide was formerly important, inasmuch as in the latter case, the law presumed that the slayer was not wholly free from blame; and therefore he was punished by forfeiture of goods, at least. But in the United States, this rule is not known ever to have been recognized ; it having been the uniform practice here, as it now is in England, where the homicide does not rise to the degree of manslaughter, to direct an acquittal.[5]

§ 119. 3. FELONIOUS HOMICIDE is of two kinds, namely, *manslaughter* and *murder ;* the difference between which consists principally in this, that in the latter there is the ingredient of malice, while in the former there is none ; or, as Blackstone expresses it, manslaughter, when voluntary, arises from the sudden heat of the passions; murder from the wickedness of the heart. MANSLAUGHTER is therefore defined to be "*the unlawful killing of another*,

[1] 4 Bl. Comm. 184 ; 1 Russ. on Crimes, 661 ; The State *v.* Hill, 4 Dev. & Batt. 491.

[2] 4 Bl. Comm. 186 ; 1 Hale, P. C. 448.

[3] 1 Hale, P. C. 485, 486 ; 1 Russ. on Crimes, 662, 664 ; cites Meade's case, 1 Lewin, C. C. 184 ; Child's case, 2 Lewin, C. C. 214 ; Hinchcliff's case, 1 Lewin, C. C. 161. [* A man cannot justify killing another by pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself; if he kill one in defence of an injury done by himself he is guilty of manslaughter at least. People *v.* Lamb, 17 Cal. 323.]

[4] 4 Bl. Comm. 136. And see Holmes's case, where several passengers were thrown over from the overloaded longboat of a foundered ship, to save the lives of the others ; in which this doctrine was very fully and ably discussed. Wharton's Am. Crim. Law, p. 397.

[5] 4 Bl. Comm. 188 ; 2 Inst. 148, 315.

*without malice, either express or implied.*" [1] And hence every indictment for wilful homicide, in which the allegation of malice is omitted, is an indictment for manslaughter only. So, on the trial of an indictment for murder, if there is no sufficient proof of malice aforethought, and the act of killing being proved, is not justified nor excused, the Jury must return a verdict for man slaughter. As this offence is supposed to have been committed without malice, so also it must have been without premeditation; and therefore there can be no accessories before the fact. Thus, it is said that, if A. is charged with murder, and B. is charged as accessory before the fact (and not as present, aiding and abetting, for such are principals), and A. is found guilty of manslaughter only, B. must be altogether acquitted.[2] But if A. is charged with murder, and B. is charged with receiving, harboring, and assisting him, well knowing that he had committed the murder; and A. be found guilty of manslaughter only; B. may be found guilty of being accessory after the fact to the latter offence.[3]

§ 120. The *indictment for manslaughter* is in the same form with an indictment for murder, hereafter to be stated, except that the allegation, "of his malice aforethought," and the word "murder," are omitted. The substance of the charge, therefore, so far as the proof is concerned, is, that the prisoner (describing him), at such a time and place, feloniously and wilfully assaulted the deceased (describing him), and killed him in the particular manner therein set forth. The allegations of diabolical motive in the slayer, and that the deceased was in the peace of God and the State, and that the offence was committed with force and arms, though usually inserted, are superfluous, and not necessary to be proved.[4] And the time of any homicide is not material to be precisely proved if it appear, both on the face of the indictment, and also by the evidence, that the death happened within a year and a day after the stroke was given, or the poison administered, or other wrongful act done, which is supposed to have occasioned the death.

[1] 4 Bl. Comm. 191; 1 Hale, P. C. 466; Commonwealth *v.* Webster, 5 Cush. 304.

[2] 1 Hale, P. C. 450; Blithe's case, 4 Rep. 43 *b*, pl. 9. [Evidence that a party is present, aiding and abetting in a murder, will support an indictment charging him with having committed the act with his own hand. Commonwealth *v.* Chapman, 11 Cush. 422. See also Regina *v.* Gaylor, 7 Cox, 253.]

[3] Rex *v.* Greenacre, 8 C. & P. 35.

[4] Heydon's case, 4 Rep. 41, pl. 5; 3 Chitty, Crim. Law, 751, n.; 2 Hale, P. C. 186, 187; Commonwealth *v.* Murphy, 6 Monthly Law Reporter, N. S. 460. [* One indicted for *manslaughter* may, on trial, be convicted for an *assault and battery*, though the indictment contain no count specially charging the minor offence. State *v.* Scott, 24 Vt. 127.]

The day is added to the year, in order to put the completion of a full year beyond all doubt, which might arise from the mode of computation by including or excluding the day of the stroke or infliction; and because, as Lord Coke has remarked, in case of life the rule of law ought to be certain; and if the death did not take place within the year and day, *the law* draws the conclusion that the injury received was not the cause of the death; and neither the Court nor Jury can draw a contrary one.[1]

§ 121. Where the crime of manslaughter only is charged, the *proof of the offence*, on the part of the prosecution, is by proving the fact of killing, with such circumstances as show criminal culpability on the part of the prisoner. And the defence consists either in a denial of the principal fact, or in a denial of all culpability, supported by the proof of circumstances, reducing the fact of killing to the degree of excusable or justifiable homicide.[2] But the distinction between murder and manslaughter most frequently arises where the indictment is for murder, and the evidence on the part of the prisoner is directed to reducing the act to the degree of manslaughter only. The cases on this subject are of two classes, the offence being either *voluntary* or *involuntary*. *Voluntary* manslaughter is where one kills another in the heat of blood; and this usually arises from *fighting* or from *provocation*. In the *former case*, in order to reduce the crime from murder to manslaughter, it must be shown that the fighting was not preconcerted, and that there was not sufficient time for the passion to subside; for in the case of a deliberate fight, such as a duel, the slayer and his second are murderers.[3] And though there were not time for passion to subside, yet if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder. Thus, if the slayer provide himself with a deadly weapon beforehand, in anticipation of the fight, and not for mere defence of his person against a felonious assault;[4] or if he take an undue advantage of the other in the fight;[5] or if, though he were in the heat of passion, he should designedly select out of several weapons equally at

[1] 3 Inst. 53; The State *v.* Orrell, 1 Dev. 139, 141; 2 Hale, P. C. 179.

[2] It is no defence to an indictment for manslaughter, that the homicide appears by the evidence to have been committed with malice aforethought, and is therefore murder; but the defendant may be properly convicted of the crime of manslaughter. Commonwealth *v.* M'Pike, 3 Cush. 181.

[3] 1 Russ. on Crimes, 531; 1 Hale, P. C. 452, 453.

[4] Regina *v.* Smith, 8 C. & P. 160; Rex *v.* Anderson, 1 Russ. on Crimes, 531; Rex *v.* Whiteley, 1 Lewin, C. C. 173.

[5] Rex *v.* Kessel, 1 C. & P. 437; Fost. 295.

hand, that which alone is deadly, it is murder.[1] Where, in a fight, the victor had followed up his advantage with great fury, giving the mortal blows after the other party was down, and had become unable to resist, it was still held to be only manslaughter.[2]

§ 122. Where homicide is committed *upon provocation*, it must appear that the provocation was considerable, and not slight only, in order to reduce the offence to manslaughter; and for this purpose the proof of *reproachful words*, how grievous soever, or of *actions or gestures* expressive of contempt or reproach, without an assault, actual or menaced, on the person, will not be sufficient if a deadly weapon be used. But if the fatal stroke were given by the hand only, or with a small stick, or other instrument not likely to kill, a less provocation will suffice to reduce the offence to manslaughter.[3] Thus, the killing has been held to be only manslaughter, though a deadly weapon was used, where the provocation was by pulling the nose;[4] purposely jostling the slayer aside in the highway;[5] or other actual battery.[6] So, where a husband caught a man *in the act* of adultery with his wife, and instantly killed either or both of them.[7] And where a boy, being beaten by another boy, ran home to his father, who, seeing him very bloody, and hearing his cries, instantly took a rod or small stick, and running to the field three quarters of a mile distant, struck the aggressor on the head, of which he died; this was ruled manslaughter only, because it was done upon provocation by the injury to his son, and in sudden heat and passion.[8]

[1] 1 Leach, 151; 1 East, P. C. 245; Foster, 294, 295; Rex *v.* Anderson, *supra;* Rex *v.* Whiteley, *supra;* 1 Russ on Crimes, 531.

[2] Rex *v.* Aves, Russ. & Ry. 166. But it has been thought that where the manner of the fight was deadly, as, "an up-and-down fight," if death ensued, it would be murder. Rex *v.* Thorpe, 1 Lewin, C. C. 171. [In *Maine*, upon an indictment charging an assault with intent to murder, the Jury may find an assault with intent to kill, but not to murder. State *v.* Waters, 39 Maine, 54. See also The People *v.* Johnson, 1 Parker, C. R. 291, and The People *v.* Shaw, Ib. 327.]

[3] Foster, 290, 291; *Infra*, § 124; United States *v.* Wiltberger, 3 Wash. 515.

[4] J. Kely. 135.

[5] Lanure's case, 1 Hale, P. C. 455. If the provocation by a blow be too slight to reduce the killing to manslaughter, yet it has been thought sufficient, if accompanied by words and gestures calculated to produce a degree of exasperation equal to what would be caused by a violent blow. Regina *v.* Sherwood, 1 Car. & Kir. 556, per Pollock, C. B.

[6] Rex *v.* Stedman, Foster, 292.

[7] Maddy's case, 1 Vent. 156; T. Raym. 212; S. C. nom. Manning's case, where the Court is reported to have said that "there could not be a greater provocation than this." J. Kely. 137. See also The People *v.* Ryan, 2 Wheeler, C. Cass. 54; Regina *v.* Fisher, 8 C. & P. 182; Pearson's case, 2 Lewin, C. C. 216; Alison's Crim. Law of Scotland, p. 113; Regina *v.* Kelly, 2 C. & K. 814; [State *v.* Samuel, 3 Jones (Law), 74.]

[8] Royley's case, Godb. 182; Cro. Jac. 296; 12 Rep. 87; 1 Hale, P. C. 453; Foster, 294, 295, S. C. Coke calls the instrument used in this case, a *cudgel*. Godbolt says it was a *rod*. Lord Hale terms it a *staff*. Croke terms it a *little cudgel;* and Lord Raymond observes, that it was a weapon "from which no such fatal event

§ 123. Another kind of provocation sometimes arises in the *execution of process*. For though the killing of an officer of justice, while in the regular execution of his duty, knowing him to be an officer, and with intent to resist him in such exercise of duty, is murder; the law in that case implying malice; yet where the process is defective or illegal, or is executed in an illegal manner, the killing is only manslaughter, unless circumstances appear to show express malice; and then it is murder.[1] Thus, the killing will be reduced to manslaughter, if it be shown in evidence that it was done in the act of protecting the slayer against an arrest by an officer acting beyond the limits of his precinct;[2] or, by an assistant not in the presence of the officer;[3] or, by virtue of a warrant essentially defective in describing either the person accused or the offence;[4] [*or, where the officer had no warrant, although he knew

could reasonably be expected." 2 Ld. Raym. 1498. Whatever it may have been, all agree that it was not a lethal or deadly weapon, from the use of which malice might have been presumed; and therefore the killing was but manslaughter, in the heat of passion, and upon great provocation. [Upon an indictment for murder, where it appeared that the deceased attacked the prisoner for the purpose of arresting or assaulting him unlawfully, that he was armed with a hatchet when he made the attack, and that the prisoner was found to have a wound on the head evidently made with a hatchet, it is competent for the prisoner to show that the deceased had threatened him during the day before the attack, even though the prisoner did not know of the threats at the time he was attacked. To justify his killing his opponent in self-defence, it is not necessary to prove that the assailant actually intended to kill him or do him great bodily harm; it is sufficient if it appear that he was attacked in such a way as to induce a reasonable and well-grounded belief that he was in actual danger of losing his life, or of suffering great bodily harm. Campbell *v.* The People, 16 Ill. 17; Cornelius *v.* The Commonwealth, 15 B. Monroe, 546; United States *v.* Mingo, 2 Curtis, C. C. 1; and see Commonwealth *v.* Wilson, 1 Gray, 337. On a trial for murder, after an assault by the deceased upon a prisoner, evidence of the quarrelsome character and great strength of the deceased is inadmissible on the question of provocation or fear of bodily harm. Commonwealth *v.* Hilliard, 2 Gray, 294.]

[1] Foster, 311; 1 Russ. on Crimes, 617; Commonwealth *v.* Drew, 4 Mass. 395, 396. If a felony has actually been committed, any man upon fresh pursuit, or hue and cry, may arrest the felon, without warrant. But *suspicion of the felony* will not be enough to justify the arrest. The felony must have been committed in fact. But if *a felony be committed*, and one is upon reasonable ground *suspected of being the felon*, and thereupon is freshly pursued by a private individual without warrant, and is killed in the attempt to arrest him, it is only manslaughter. An *officer*, however, having reasonable ground to *suspect that a felony has been committed*, may arrest and detain the supposed felon; which a private citizen cannot lawfully do. Beckwith *v.* Philby, 6 B. & C. 635, per Ld. Tenterden; 2 Hale, P. C. 76–80; 1 Russ. on Crimes, 593–595; Commonwealth *v.* Carey, 4 Law Rep. 169, 173, N. S. And see Price *v.* Seeley, 10 Cl. & Fin. 28; 1 Leading Crim. Cases, 143, and note; Derecourt *v.* Corbishley, 32 Eng. Law & Eq. R. 106; Rohan *v.* Sawin, 5 Cush. 281; Broughton *v.* Jackson, 11 Eng. Law & Eq. R. 388; Thomas *v.* Russell, 25 Eng. Law & Eq. R. 550; Samuel *v.* Payne, 1 Doug. 359; 1 Leading Crim. Cases, 157; Ledwith *v.* Catchpole, Cald. 291; 1 Leading Crim. Cases, 158, and note; Regina *v.* Walker, 25 Eng. Law & Eq. R. 589; The State *v.* Weed, 1 Foster (N. H.), 262; 1 Leading Crim. Cases, 164, and note.

[2] 1 Hale, P. C. 459; Rex *v.* Mead, 2 Stark. R. 205.

[3] Rex *v.* Patience, 7 C. & P. 795; Rex *v.* Whalley, Id. 245.

[4] Rex *v.* Hood, 1 Moody, C. C. 281; Foster, 312; 1 Hale, P. C. 457; Hoye *v.* Bush, 1 Man. & Grang. 775; 2 Scott, N. R. 86; The State *v.* Weed, 1 Foster, (N.

that one had been issued, but said that he had one, and refused to give any explanation whatever;[1]] or, where the party had no notice, either expressly, or from the circumstances of the case, that a lawful arrest was intended; but, on the contrary, honestly believed that his liberty was assailed without any pretence of legal authority;[2] or, where the arrest attempted, though for a felony, was not only without warrant, but without hue and cry, or fresh pursuit; or, being for a misdemeanor only, was not made *flagrante delicto*;[3] or, where the party was, on any other ground, not legally liable to be arrested or imprisoned.[4] So, if the arrest, though the party were legally liable, was made in violation of law, as, by breaking open the outer door or window of the party's dwelling-house, on civil process; for such process does not justify the breaking of the dwelling-house, to make an original arrest; or, by breaking the outer door or window, on criminal process, without previous notice given of his business, with demand of admission, or something equivalent thereto, and a refusal.[5]

§ 124. But the *proofs of provocation*, in order to reduce the act of killing to the degree of manslaughter, must, as we have seen, be by evidence of *something more than words or gestures;* for these, however opprobrious and irritating, are not sufficient in law to free the slayer from the guilt of murder, if the person was killed with a deadly weapon, or there be a manifest intent to do him some great bodily harm. But if, upon provocation by words or gestures only, the party, in the heat of passion, intended merely to chastise the insolence of the other, by a box on the ear, or a stroke with a small stick or other weapon not likely to kill, and death accidentally ensued, this would be but manslaughter.[6] And it seems that if, upon provocation by words only, the party provoked should strike the other a blow not mortal, which is returned by the other, and a fight thereupon should ensue, in

H.), 262; 1 Leading Crim. Cases, 164, and note.

[1] [* Drennan *v.* People, 10 Mich. 169.]

[2] 1 Hale, P. C. 470. And see Buckner's case, Sty. 467; J. Kely. 136; 1 Russ. on Crimes, 623; Rex *v.* Withers, 1 East, P. C. 233; Rex *v.* Howarth, 1 Moody, C. C. 207.

[3] 1 Russ. on Crimes, 593 - 595, 598; 1 Hale, P. C. 463; Rex *v.* Curvan, 1 Moody, C. C. 132; Rex *v.* Curran, 3 C. & P. 397; Commonwealth *v.* Carey, 4 Law Rep. 170, N. S.

[4] Commonwealth *v.* Drew, 4 Mass. 395, 396; United States *v.* Travers, 2 Wheeler, Cr. Cas. 495, 509; Rex *v.* Corbett, 4 Law Rep. 369; Rex *v.* Thompson, 1 Moody, C. C. 80; Rex *v.* Gillow, Id. 85; 1 Lewin, C. C. 57; Regina *v.* Phelps, Car. & Marsh. 180, 186.

[5] Foster, 320. Whether a previous demand be necessary in cases of felony, *quære;* and see Launock *v.* Brown, 2 B. & Ald. 592.

[6] Foster, 290, 291; Watts *v.* Brains, Cro. El. 778; J. Kely. 130, 131; 1 Hale, P. C. 455; 1 Russ. on Crimes, 580; *Supra*, § 122.

which the party first provoked should kill the other, this also would be but manslaughter.[1] So, if the words were words of menace of bodily harm, accompanied by some outward act showing an intent immediately to do the menaced harm, this would be a sufficient provocation to reduce the killing to manslaughter.[2]

§ 125. In all these cases of voluntary homicide, upon provocation, and in the heat of blood, it must appear that the fatal stroke was given *before the passion*, originally raised by the provocation, *had time to subside, or the blood to cool;* for it is only to human frailty that the law allows this indulgence, and not to settled malignity of heart. If, therefore, after the provocation, however great it may have been, there were time for passion to subside, and for reason to resume her empire before the mortal blow was struck, the homicide will be murder.[3] And whether the time which elapsed between the provocation and the stroke were sufficient for that purpose, is a question of law to be decided by the Court; the province of the Jury being only to find what length of time did in fact elapse.[4]

§ 126. It is further to be observed, that in cases of homicide upon provocation or in sudden fight, if there be evidence of actual malice, the offence, as we shall hereafter see, will amount to murder. It must therefore appear that the *chastisement or act of force* intended on the part of the slayer, *bore some reasonable proportion to the provocation received*, and did not proceed from brutal rage or diabolical malignity. Proof of great provocation is requisite to extenuate the offence, where the killing was by a deadly weapon, or by other means likely to produce death; but if no such weapon or means were used, a less degree of provocation will suffice.[5] Thus, while the prisoner, who was a soldier, was struck in the face with an iron patten, and thereupon killed the assailant

[1] Morley's case, 1 Hale, P. C. 456; J. Kely. 55, 130; 1 Russ. on Crimes, 580.

[2] 1 Hale, P. C. 456; 1 East, P. C. 233; 1 Russ. on Crimes, 580. And see Monroe's case, 5 Georgia, 85.

[3] Rex *v.* Oneby, 2 Ld. Raym. 1493–1496; Foster, 296; 1 Hale, P. C. 453; Rex *v.* Thomas, 7 C. & P. 817.

[4] 2 Ld. Raym. 1493. And so held in Regina *v.* Fisher, 8 C. & P. 182, by Park, J., Parke, B., and Mr. Recorder Law. Both questions had previously been left to the Jury, by Ld. Tenterden, in Rex *v.* Lynch, 5 C. & P. 324, and by Tindal, C. J., in Rex *v.* Hayward, 6 C. & P. 157. [* The act must be done when reason is disturbed, or obscured by passion, to an extent which *might render* ordinary men of fair average disposition *liable* to act rashly, without reflection, and from passion rather than from judgment; and only in very clear cases might the court, perhaps, undertake to decide these questions without committing error. Maher *v.* People, 10 Mich. 212.]

[5] Foster, 291; 1 Hale, P. C. 454; 1 Russ. on Crimes, 581.

with his sword, it was held only manslaughter.[1] So, where a pickpocket, caught in the fact, was thereupon thrown into a pond by way of punishment, and was unintentionally drowned, this was ruled to be manslaughter.[2] And if one should find another trespassing on his land by cutting his wood or otherwise, and in the first transport of passion should beat him by way of chastisement for the offence, and unintentionally kill him, no deadly weapon being used, it would be but manslaughter.[3] But if the provocation be resented in a brutal and ferocious manner, evincive of a malignant disposition to do great mischief, out of all proportion to the offence, or of a savage disregard of human life, the killing will be murder. Such was the case of the park-keeper, who, finding a boy stealing wood in the park, tied him to a horse's tail and beat him, whereupon the horse running away, the boy was killed.[4] So, in the case of the trespasser cutting wood as above mentioned, if the owner had knocked out his brains with an axe or hedge stake, or had beaten him to death with an ordinary cudgel, in an outrageous manner, and beyond the bounds of sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent on mischief, which enter into the true notion of malice, in the legal sense of that word.[5]

§ 127. The *defence of provocation may be rebutted*, by proof that the provocation was sought for and induced by the prisoner himself, in order to afford an opportunity to wreak his malice; or, by proof of express malice, notwithstanding the provocation; or, that after it was given there was sufficient time for the passion thereby excited to subside; or, that the prisoner did not in fact act upon the provocation, but upon an old subsisting grudge.[6]

§ 128. *Involuntary manslaughter* is where one, doing an *unlawful act*, not felonious nor tending to great bodily harm, or doing a *lawful act*, without proper caution or requisite skill, undesignedly

[1] Stedman's case, Foster, 292.

[2] Rex *v.* Fray, 1 East, P. C. 236; 1 Russ. on Crimes, 582.

[3] 1 Hale, P. C. 473; Foster, 291. And see Rex *v.* Wiggs, 1 Leach, C. C. (4th ed.), 379; Wild's case, 2 Lewin, C. C. 214; Rex *v.* Connor, 7 C. & P. 438.

[4] Halloway's case, Cro. Car. 131; J. Kely. 127.

[5] Foster, 291; J. Kely. 132.

[6] Rex *v.* Mason, Foster, 132; Id. 296; 1 Hale, P. C. 452; Rex *v.* Hayward, 6 C. & P. 157; 1 East, P. C. 239; Regina *v.* Kirkham, 8 C. & P. 115; Rex *v.* Thomas, 7 C. & P. 817; *Supra*, § 125; [State *v.* Johnson, 2 Jones (Law), 247.] [* Where the defendant was accused of murder of one who was injuring a mining claim, it was held that evidence was admissible on the part of the defendant of his ownership of the claim at the time to show the condition of his mind, and the character of the offence, and as part of the *res gestæ*. People *v.* Costello, 15 Cal. 350.]

kills another.[1] To reduce a charge of murder to manslaughter of this kind, the evidence will be directed to show either that the act intended or attempted to be done was not felonious, nor tending to great bodily harm; or that it was not only lawful, but was done with due care and caution, or in cases of science, with requisite skill. Thus, if one, shooting at another's poultry wantonly, and without intent to steal them, accidentally kills a man, it is but manslaughter; but if he had intended to have stolen the poultry, it would have been murder.[2] So, if he throw a stone at another's horse, and inadvertently it kills a man;[3] or if one, in playing a merry, though mischievous prank, cause the death of another, where no serious personal hurt was intended, as by tilting up a cart, or the like, it is not murder, but manslaughter.[4] But if the sport intended was dangerous, and likely in itself to produce great bodily harm, or to cause a breach of the peace, these circumstances might show malice, and fix upon the party the guilt of murder.[5]

§ 129. If the act be in itself *lawful*, but done in an improper manner, whether it be by excess, or by culpable ignorance, or by want of due caution, and death ensues, it will be manslaughter.[6] Such is the case where death is occasioned by excessive correction given to a child by the parent or master;[7] or by ignorance, gross negligence, or culpable inattention or maltreatment of a patient on the part of one assuming to be his physician or surgeon;[8] or by the negligent driving of a cart or carriage,[9] or the like ill management of a boat; or by gross carelessness in casting down rubbish from a staging, or the like.[10] And, generally, it may be laid down,

[1] Bl. Comm. 182, 192; Foster, 261, 262.

[2] 1 Foster, 258, 259.

[3] 1 Hale, P. C. 39.

[4] Rex *v.* Sullivan, 7 C. & P. 641. And see 1 East, P. C. 257; 1 Russ. on Crimes, 637, 638; Rex *v.* Martin, 3 C. & P. 211; Rex *v.* Errington, 2 Lewin, C. C. 217; 3 Inst. 57.

[5] 1 Russ. on Crimes, 637, 638.

[6] [In the recent case of Regina *v.* Hughes, 1 Dears. & Bell, 248, it is laid down that "that which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence."]

[7] 1 Hale, P. C. 473, 474; J. Kely. 64, 133; Rex *v.* Connor, 7 C. & P. 438; Foster, 262.

[8] 1 Hale, P. C. 429; Rex *v.* Webb, 1 M. & Rob. 405; 2 Lewin, C. C. 196; Regina *v.* Spilling, 2 M. & Rob. 107; Rex *v.* Spiller, 5 C. & P. 333; Rex *v.* Simpson, 1 Lewin, C. C. 172; Rex *v.* Ferguson, Id. 181; Rex *v.* Long, 4 C. & P. 398. Upon such a charge, evidence cannot be gone into on either side, of former cases treated by the prisoner. Regina *v.* Whitehead, 3 C. & K. 202. And see Rex *v.* Van Butchell, 3 C. & P. 629; Rex *v.* Williamson, Id. 635; Commonwealth *v.* Thompson, 6 Mass. 134.

[9] East, P. C. 263; Rex *v.* Walker, 1 C. & P. 320; Rex *v.* Knight, 1 Lewin, C. C. 168; Rex *v.* Grout, 6 C. & P. 629; Alison's Crim. Law of Scotland, pp. 113–122. See, as to bad navigation, Regina *v.* Taylor, 9 C. & P. 672; Alison's Crim. Law of Scotland, pp. 122; The United States *v.* Warner, 4 McLean, 643.

[10] 1 East, P. C. 262; Foster, 262; 1 Hale, P. C. 472; 3 Inst. 57.

that where one, by his negligence, has contributed to the death of another, he is responsible.[1] The caution which the law requires in all these cases, is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end.[2]

§ 130. MURDER, which is the other kind of felonious homicide, is when a person of sound memory and discretion, unlawfully kills any reasonable creature in being, under the peace of the State, with malice aforethought, either express or implied.[3] In the *indictment* for this crime, it is alleged that the *prisoner*, describing him by his true name and addition, on such a *day*, at such a *place* within the *county* where the trial is had, of his *malice* aforethought, feloniously killed and *murdered* the *deceased*, describing him as above, by the means and in the *manner* therein set forth.[4] All these allegations are material to be proved by the prosecutor, except the allegation that the deceased was in the peace of the State, which needs no proof, but will be presumed, until the contrary appears.

§ 131. The point to which the evidence of the prosecutor is usually first directed, is the *death* of the person alleged to have been killed. And this involves two principal facts, namely, that the person is dead, and that he died in consequence of the injury alleged to have been received.[5] The *corpus delicti*, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that Lord Hale advises that no person be convicted of culpable homicide, unless the fact were proved to have been done, or at least the body found dead.[6] Without this proof a conviction

[1] Regina *v.* Swindall, 2 C. & K. 232, per Pollock, C. B.

[2] Foster, 264; Alison's Crim. Law of Scotland, pp. 143. And see Rex *v.* Hull, Kel. 40; 1 Leading Crim. Cases, 42; Regina *v.* Murray, 5 Cox, C. C. 509; Regina *v.* Lowe, 4 Cox, C. C. 449; 3 C. & K. 123; 1 Leading Crim. Cases, 49; Regina *v.* Middleship, 5 Cox, C. C. 275; Regina *v.* Longbottom, 3 Cox, C. C. 439; 1 Leading Crim. Cases, 54; Regina *v.* Pocock, 17 Q. B. 34; 24 Eng. Law & Eq. R. 190. [* See Queen *v.* Ledger, 2 F. & F. 857.]

[3] 3 Inst. 47; 4 Bl. Comm. 195; 1 Russ. on Crimes, 482; Wharton's Am. Crim. Law, 356; Commonwealth *v.* Webster, 3 Cush. 304.

[4] An averment that the defendant committed the crime at a place specified, "in some way and manner, and by some means, instruments, and weapons to the Jurors unknown," is sufficient when the circumstances of the case will not admit of greater certainty in stating the means of death. Commonwealth *v.* Webster, 5 Cush. 295. [* The omission of the word "with" in charging the instrument of the homicide is not fatal. Shay *v.* People, 22 N. Y. 317.]

[5] It must also appear that the death took place within a year and a day, that is, within a full year from the time when the wound was received; otherwise the law conclusively presumes that the wound was not the cause of the death. See *supra*, § 120; The State *v.* Orrell, 1 Dev. 139, 141, per Henderson, J.; 3 Inst. 53; 3 Chitty, Crim. Law [736].

[6] 2 Hale, P. C. 290. A similar rule prevailed in the Roman Civil Law, as appears from the Digest on the laws *de pub-*

would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt.[1] But the fact, as we have already seen,[2] need not be directly proved; it being sufficient if it be established by circumstances so strong and intense as to produce the full assurance of moral certainty. Neither is it indispensably necessary to prove that the prisoner had any motive to commit the crime, though the absence of such motive ought to receive due weight in his favor.[3]

§ 132. The most positive and satisfactory *evidence of the fact of death*, is the testimony of those who were present when it happened; or who, having been personally acquainted with the deceased in his lifetime, have seen and recognized his body after life was extinct. This evidence seems to be required in the English House of Lords, in claims of peerage and *à fortiori* a less satisfactory measure of proof ought not to be required in a capital trial. In these cases the testimony of medical persons, where it can be had, is generally most desirable, whenever the nature of the case is such as to leave any doubt of the fact.[4]

§ 133. But though it is necessary that the *body of the deceased be satisfactorily identified*, it is not necessary that this be proved by direct and positive evidence, if the circumstances be such as to leave no reasonable doubt of the fact. Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the sex, age, and description of the deceased; and

*lica quæstione à familia necatorum habenda;* under which no person was put on his defence for the homicide, until the *corpus delicti* was proved; — nisi constet aliquem esse occisum, non haberi de familia quæstionem. Quæstionem autem sic accipimus, non tormenta tantum, sed *omnem inquisitionem et defensionem mortis.* Dig. lib. 29, tit. 5, l. 1, § 24, 25.

[1] Regina *v.* Hopkins, 8 C. & P. 591. So held in a case of larceny, in Tyner *v.* The State, 5 Humph. 383.

[2] *Supra*, § 30. [But see Ruloff *v.* The People, 18 N. Y. 179, where the cases are examined at great length, and the rule maintained that the fact of the death must be proved by certain and direct evidence.] In Georgia, in case of a capital conviction upon circumstantial evidence only, the Judge who passes the sentence may commute the punishment to the penitentiary for life. Hotchk. Dig. p. 795; 2 Cobb's Dig. p. 838. [* State *v.* Davidson, 30 Vt. 385.]

[3] Sumner *v.* The State, 5 Blackf. 579.

[4] Hubback on Succession, pp. 159, 160. By the Roman Civil Law, as well as by ours, the death may be proved not only by those who saw the party dead and buried, but by those who saw him dying, or, who were present at a funeral called his, but who did not see the body. Mascard. De Probat. Concl. 1077. In some cases, by that law, death might be proved by common fame; but not in cases involving highly penal consequences; — non in (causis) gravioribus; seens autem in his, quæ modicum damnum afferre possunt. Idem. Concl. 1076, n. 1, 3. It might also be proved by circumstantial evidence; but was never to be presumed, as an inference of law. Mors non præsumitur, sed est probanda; cum quilibet præsumatur vivere. Idem. Concl. 1075, n. 1. And see Idem. Concl. 1078, 1079. *Ante*, Vol. 2, tit. DEATH.

the agency of the prisoner in their mutilation, or in producing the appearances found upon them, should be established. Identification may also be facilitated by circumstances apparent in and about the remains, such as the apparel, articles found on the person, and the contents of the stomach, connected with proof of the habits of the deceased in respect to his food, or with the circumstances immediately preceding his dissolution.[1]

§ 134. The death and the identity of the body being established, it is necessary, in the next place, to prove that the deceased *came to his death by the unlawful act of another person.* The possibility of reasonably accounting for the fact by *suicide*, by *accident*, or by any *natural cause*, must be excluded by the circumstances proved; and it is only when no other hypothesis will explain all the conditions of the case, and account for all the facts, that it can safely and justly be concluded that it has been caused by intentional injury.[2] Though suicide and accident are often artfully but falsely suggested in the defence, as causes of the death, especially where the circumstances are such as to give plausibility to the suggestion; yet the suggestion is not on this account to be disregarded; but all the facts relied on are to be carefully compared and considered; and upon such consideration, if the defence be false, some of the circumstances will commonly be found to be irreconcilable with the cause alleged. Scientific evidence sometimes leads to results perfectly satisfactory to the mind; but when uncorroborated by conclusive moral circumstances, it should be received with much caution and reserve; and justice no less than prudence requires that, where the guilt of the accused is not conclusively made out, however suspicious his conduct may have been, he should be acquitted.[3]

[1] Wills on Cir. Evid. pp. 164–168. See Boorns's case, *ante*, Vol. 1, § 214, n. That the *name* as well as the person of the deceased must be precisely identified, has already been shown, *supra*, § 22. The subject of the identification of mutilated remains was very fully discussed in the trial of Dr. Webster, reported by Mr. Bemis. [* See State *v.* Williams, 7 Jones's Law, 446.]

[2] Wills on Cir. Evid. p. 168.

[3] Ibid. pp. 168, 172; *Supra*, § 29. On this subject the following important observations are made by Mr. Starkie. "It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dishonor, and to preserve his property from forfeiture. Instances have also occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy, by substantiating a charge of murder. On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se*. It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth. Where the circumstances are natural and real, and have not been

§ 135. In the case of *death by poisoning*, it is not necessary to prove the particular substance or kind of poison used; nor to give direct and positive proof what is the quantity which would destroy life;[1] nor is it necessary to prove that such a quantity was found in the body of the deceased. It is sufficient if the Jury are satisfied, from all the circumstances, and beyond reasonable doubt, that the death was caused by poison, administered by the prisoner.[2] Upon the latter point, the material questions are, whether the prisoner had any motive to poison the deceased, — whether he had

*counterfeited* with a view to evidence, they must necessarily correspond and agree with each other, for they did really so coexist; and, therefore, if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true. The question, whether a person has died a natural death, as from apoplexy, or a violent one from strangulation; whether the death of a body found immersed in water has been occasioned by drowning, or by force and violence previous to the immersion; whether the drowning was voluntary, or the result of force; whether the wounds inflicted upon the body were inflicted before or after death, are questions usually to be decided by medical skill. It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial evidence against him. Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is, therefore, in all cases, expedient that all the accompanying facts should be observed and noted with the greatest accuracy; such as the position of the body, the state of the dress marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned." 2 Stark. on Evid. 519 – 521 (6th. Am. ed.).

[1] The observations of Mr. Lofft, on the testimony of men of science, are worthy of profound attention. "In general," he says, "it may be taken, that when the testimonies of professional men of just estimation are *affirmative*, they may be safely credited; but when *negative*, they do not amount to a disproof of a charge otherwise established by various and independent circumstances. Thus, on the view of a body after death, on suspicion of *poison*, a physician may see cause for not positively pronouncing that the party died by *poison*, yet if the party charged be interested in the death, if he appears to have made preparations of poisons without any probable just motive, and this secretly; if it be in evidence that he has in other instances brought the life of the deceased into hazard; if he has discovered an expectation of the fatal event; if that event has taken place suddenly, and without previous circumstances of ill health; if he has endeavored to stifle inquiry by precipitately burying the body, and afterwards, on inspection, signs agreeing with poison are observed, though such as medical men will not positively affirm could not have been owing to any other cause, the accumulative strength of circumstantial evidence may be such as to warrant a conviction; since more cannot be required than that the charge should be rendered highly credible from a variety of detached points of proof, and that supposing poison to have been employed, stronger demonstration could not reasonably have been expected to have been, under all the circumstances, producible." 1 Gilb. on Evid. by Lofft, p. 302.

[2] Rex *v.* Tawell, cited in Wills on Cir. Evid. 180, 181. Statements made by the deceased, a short time previous to the alleged poisoning, are admissible to prove the state of his health at that time. Regina *v.* Johnson, 2 C. & K. 354. And see *ante*, Vol. 1, § 102.

the opportunity of administering poison, — and whether he had poison in his possession or power to administer. To these inquiries, every part of the prisoner's conduct and language, in relation to the subject, are material parts of the *res gestæ*, and are admissible in evidence.[1] But it is not necessary to prove that the poison was administered by the prisoner's own hand; for if, with intent to destroy the deceased, he prepares poison and lays it in his way and he accordingly takes it and dies; or, if he gives it to an innocent third person, to be administered to the deceased as a medicine, which is done and it kills him; this evidence will support a charge against the prisoner as the murderer.[2] So, where the third person, who was directed by the prisoner to administer the dose, omitted to do so, and afterwards the poison was accidentally administered by a child, and death ensued; this was held sufficient to support an indictment against the prisoner as the sole and immediate agent in the murder.[3]

§ 136. To support an indictment for *infanticide*, at common law, it must be clearly proved that the child was wholly born, and was born alive, having an independent circulation, and existence. Its having breathed is not sufficient to make the killing amount to murder; as it might have breathed before it was entirely born;[4] nor is it essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time afterwards.[5] Neither is it material that it is still connected with the mother by the umbilical cord, if it be wholly brought forth, and have an independent circulation.[6] But in all cases of this class it must be remembered, that stronger evidence of *intentional* violence will be required than in other cases; it being established by experience that in cases of illegitimate birth, the mother, in the agonies of pain or despair, or in the paroxysm of temporary insanity, is sometimes the cause of the death of her

[1] See the observations of Buller, J., in Donellan's case; and of Abbott, J., in Rex *v.* Donnall; and of Rolfe, B., in Regina *v.* Graham; and of Parke, B., in Rex *v.* Tawell; cited in Wills on Cir. Evid. 187 - 191; Regina *v.* Geering, 18 Law J. 215; *Supra*, § 9.

[2] J. Kely. 52, 53; Foster, 349; 1 Hale, P. C. 616; Rex *v.* Nicholson, 1 East, P. C. 346.

[3] Regina *v.* Michael, 9 C. & P. 356; 2 Moody. C. C. 120.

[4] Rex *v.* Enoch, 5 C. & P. 539; Rex *v.* Poulton, Id. 329.

[5] Rex *v.* Brain, 6 C. & P. 349.

[6] Rex *v.* Reeves, 9 C. P. 25; Rex *v.* Crutchley, 7 C. & P. 814; Rex *v.* Sellis, Id. 850; Regina *v.* Wright, 9 C. & P. 754; Wills on Cir. Evid. p. 204; Regina *v.* Trilloe, 2 Moody, C. C. 260; C. M. 650. If the child be intentionally mortally injured before it is born, but is born alive, and afterwards dies of that injury, it is murder. 3 Inst. 50; 1 Russ. on Crimes, 485; Rex *v.* Senior, 1 Moody C. C. 346; 4 Com. Dig. Justices, M. 2, p. 449. See Regina *v.* West, 2 C. & K. 784.

offspring, without any intention of committing such a crime; and that therefore mere appearances of violence on the child's body are not sufficient to establish her guilt, unless there be proof of circumstances, showing that the violence was intentionally committed, or the marks are of such a kind as of themselves to indicate intentional murder.[1]

§ 137. After proving that the deceased was feloniously killed, it is necessary to show that *the prisoner was the guilty agent.* And here, also, any circumstances in the conduct and conversation of the prisoner, tending to fix upon him the guilt of the act, such as the motives which may have urged him to its commission, the means and facilities for it which he possessed, his conduct in previously seeking for an opportunity, or in subsequently using means to avert suspicion from himself, to stifle inquiry, or to remove material evidence, are admissible in evidence. Other circumstances, such as possession of poison, or a weapon, wherewith the deed may have been done, marks of blood, the state of the prisoner's dress, indications of violence, and the like, are equally competent evidence. But it is to be recollected, that a person of weak mind or nerves, under the terrors of a criminal accusation, or of his situation as calculated to awaken suspicion against him, and ignorant of the nature of evidence, and the course of criminal proceedings, and unconscious of the security which truth and sincerity afford, will often resort to artifice and falsehood, and even to the fabrication of testimony, in order to defend and exonerate himself.[2] In order, therefore, to convict the prisoner upon the evidence of circumstances, it is held necessary not only that the circumstances all concur to show that he committed the crime, but that they all be inconsistent with any other rational conclusion.[3]

[1] Alison's Prin. Crim. Law, pp. 158, 159; Wills on Cir. Evid. 206, 207.

[2] 2 Hale, P. C. 290; 3 Inst. 202; 2 Stark. Ev. 521, 522.

[3] Hodge's case, 2 Lewin, C. C. 227. In this case the prisoner was charged with murder. The case was one of circumstantial evidence altogether, and contained no one fact which, taken alone, amounted to a presumption of guilt. The murdered party (a woman), who was also robbed, was returning from market with money in her pocket; but how much, or of what particular description of coin, could not be ascertained distinctly. The prisoner was well acquainted with her, and had been seen near the spot (a lane), in or near which the murder was committed, very shortly before. There were also four other persons together in the same lane about the same period of time. The prisoner, also, was seen some hours after, and on the same day, but at a distance of some miles from the spot in question, burying something which on the following day was taken up and turned out to be money, and which corresponded generally as to amount with that which the murdered woman was supposed to have had in her possession when she set out on her return

§ 138. But in order to prove that the prisoner was the guilty agent, it is not necessary to show that the fatal deed was done immediately by *his own hand*. We have already seen that if he were actually present, aiding and abetting the deed; or were constructively present, by performing his part in an unlawful and felonious enterprise, expected to result in homicide, such as by keeping watch at a distance to prevent surprise or the like, and a murder is committed by some other of the party, in pursuance of the original design; or if he combined with others to commit an unlawful act, with the resolution to overcome all opposition by force, and it results in a murder; or if he employ another person, unconscious of guilt, such as an idiot, lunatic, or child of tender age, as the instrument of his crime, he is guilty as the principal and immediate offender, and the charge against him as such will be supported by evidence of these facts.[1]

§ 139. If death ensues from a *wound*, given in malice, but *not in its nature mortal*, but which being neglected or mismanaged, the party died; this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died.[2] So, if the deceased were ill of a disease apparently mortal, and his death were hastened by injuries maliciously inflicted by the prisoner, this proof will support an indictment against him for murder; for an offender shall not apportion his own wrong.[3]

home from market, and of which she had been robbed.

Alderson, B., told the Jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, "not only that those circumstances were consistent with *his* having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person*. He then pointed out to them the proneness of the human mind to look for — and often slightly to distort the facts in order to establish such a proposition — forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. The learned Baron then summed up the facts of the case, and the Jury returned a verdict of Not guilty. See 1 Stark. Ev. (London ed. 1853), 862.

[1] *Ante*, Vol. I, § 111; *Supra*, tit. ACCESSORY, *passim*; *Supra*, § 9; Foster, 259, 350, 353; Rex *v.* Culkin, 5 C. & P. 121; 1 Hale, P. C. 461; 1 Russ. on Crimes, 26–30; Regina *v.* Tyler, 8 C. & P. 616; [Commonwealth *v.* Chapman, 11 Cush. 422.]

[2] Commonwealth *v.* M'Pike, 3 Cush. 181; McAllister *v.* The State, 17 Ala. 434; Commonwealth *v.* Green, 1 Ashm. 289; Rex *v.* Rew, J. Kely. 26; 1 Hale, P. C. 428; 1 Russ. on Crimes, 505; Regina *v.* Holland, 2 M. & Rob. 351; Alison's Crim. Law of Scotland, 147.

[3] 1 Hale, P. C. 428; 1 Russ. on Crimes, 505, 506, and note by Greaves; Rex *v.* Martin, 5 C. & P. 128; Rex *v.* Webb, 1 M. & Rob. 405; [Commonwealth *v.* Fox, 7 Gray, 585.]

§ 140. The *mode of killing* is not material. *Moriendi mille figuræ.* It is only material that it be shown that the deceased died of the injury inflicted, as its natural, usual, and probable consequence. The nature of the injury is specifically set forth in the indictment; but, as we have already seen,[1] it is *sufficient if the proof agree with the allegation in its substance and generic character*, without precise conformity in every particular. Thus, if the allegation be that the death was caused by stabbing with a dagger, and the proof be of killing by any other sharp instrument;[2] or if it be alleged that the death was caused by a blow with a club, or by a particular kind of poison, or by a particular manner of suffocation, and the proof be of killing by a blow given with a stone or any other substance, or by a different kind of poison, or another manner of suffocation, it is sufficient;[3] for, as Lord Coke observes, the evidence agrees with the effect of the indictment, and so *the variance from the circumstance is not material.* But if the evidence be of death *in a manner essentially different* from that which is alleged; as, if the allegation be of stabbing or shooting, and the evidence be of death by poisoning; or the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone; the indictment is not supported.[4] And whatever be the act of violence alleged, it must appear in evidence that the death was the consequence of that act. But if it be proved that blows were given by a lethal weapon, and were followed by insensibility or other symptoms of fatal danger, and afterwards by death, this is sufficient to throw on the prisoner the burden of proving that the death proceeded from some other cause.[5]

§ 141. Where the death is charged to have proceeded from a particular artificial cause, and the proof is, that it was only *accelerated*

[1] *Ante*, Vol. 1, § 65. And see 2 Hawk. P. C. ch. 46, § 37.

[2] Rex *v.* Mackalley, 9 Rep. 65, 67; 2 Inst. 319. So, if the charge be of murder by "cutting with a hatchet," or, by "striking and cutting with an instrument unknown," evidence may be given of shooting with a pistol. The People *v.* Colt, 3 Hill (N. Y.), 432. And if the charge be of shooting with a leaden bullet, it is supported by proof of shooting with a load of duck-shot. Goodwin's case, 4 Sm. & M. 520.

[3] 2 Hale, P. C. 185; Rex *v.* Tye, Russ. & Ry. 345; Rex *v.* Culkin, 5 C. & P. 121; Rex *v.* Waters, 7 C. & P. 250; Rex *v.* Grounsell, Id. 788; Rex *v.* Martin, 5 C. & P. 128. And see Rex *v.* Hickman, Id. 151; Regina *v.* O'Brian, 2 C. & K. 115; Regina *v.* Warman, Id. 195; *Ante*, Vol. 1, § 65.

[4] Rex *v.* Thompson, 1 Moody, C. C. 139; Rex *v.* Kelly, Id. 113. If the allegation be of shooting with a leaden bullet, and the proof be that there was no bullet, but that the injury proceeded from the wadding; *quære*, whether the charge is supported by the evidence. And see Rex *v.* Hughes, 5 C. & P. 126.

[5] United States *v.* Wiltberger, 3 Wash. 515.

*by that cause*, but in fact *proceeded from another artificial cause*, the evidence does not support the charge. Thus, where the charge was of causing the death of a child by exposing it to cold, and the proof was, that it was found exposed in a field, alive, but with a mortal contusion on its head, and that it died in a few hours afterward; it was held, that if the death was only accelerated by the exposure, the charge was not supported.[1] So, if the indictment charges that the death was occasioned by *two jointly co-operating causes*, as, by starving and beating, both must be proved, or the indictment fails.[2] But if the charge be of killing by the act of the prisoner as the cause, and the proof is that the deceased was sick, and must soon have died from that disease, as a *natural* consequence, the violent act of the prisoner only having *accelerated* his death, the charge is nevertheless supported.[3]

§ 142. *Forcing a person to do an act which causes his death*, renders the death the guilty deed on him who compelled the deceased to do the act. And it is not material whether the force were applied to the body or the mind; but if it were the latter, it must be shown that there was the apprehension of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; and it need not appear that there was *no* other way of escape, but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take.[4] But if the charge be that the prisoner "did compel and force" another person to do an act, which caused the death of a third party, this allegation will require the evidence of personal affirmative force, applied to the party in question. Thus, where it was stated in the indictment, that the prisoner "did compel and force" A. and B. to leave working at the windlass of a coal-mine, by means of which the bucket fell on the head of the deceased, who was at the bottom of the mine, and killed him; and

[1] Stockdale's case, 2 Lewin, C. C. 220; 1 Russ. on Crimes, 566.

[2] Ibid.; Rex *v.* Saunders, 7 C. & P. 277.

[3] The State *v.* Morea, 2 Ala. 275; [Commonwealth *v.* Fox, 7 Gray, 585. An assault with the hands and feet only upon a person whom the prisoner knew, or had reasonable cause to believe, was so feeble that the attack might hasten her death, is enough to warrant a conviction of murder. Otherwise, if the criminal did not know, or have reasonable cause to believe, the deceased to be so feeble. Ibid.]

[4] Regina *v.* Pitts, Carr. & Marshm. 284, per Erskine, J.; Rex *v.* Evans, 1 Russ. on Crimes, 489; Rex *v.* Waters, 6 C. & P. 328. If a shipmaster knowingly and maliciously compels a sick or disabled seaman to go aloft, while he is in such a state of debility and exhaustion that he cannot comply without danger of death or enormous bodily injury, and the seaman falls from the mast and is drowned or killed, it is murder in the master, whether the means of compulsion were moral or physical. United States *v.* Freeman, 4 Mason, 505.

the evidence was, that A. and B. were working at one handle of the windlass, and the prisoner at the other, all their united strength being requisite to raise the loaded bucket, and that the prisoner let go his handle and went away, whereupon the others, being unable to hold the windlass alone, let go their hold, and so the bucket fell and killed the deceased; it was held, that this evidence was not sufficient to support the indictment.[1]

§ 143. In regard to the *place* where the crime was committed, it is material to prove that it was done in the *county* where the trial is had; for by the common law, murder, like all other offences, can be inquired of only in the county where it was committed. Hence, the indictment should be so drawn, that it may judicially appear to the Court that the offence was committed within the county, this being the limit of their jurisdiction; and the uniform course, in capital cases, has always been to state also the town or parish where it was done; but it is not material, at this day, to prove the town or parish, in any case, unless where it is stated as matter of local description, and not as venue.[2] Neither is it material, as we have already seen, to prove the precise *time* when the crime was perpetrated, if it be alleged and proved that the death took place within a year and a day after the injury or mortal stroke was inflicted.[3]

§ 144. The chief characteristic of this crime, distinguishing it from every other species of homicide, and therefore indispensably necessary to be proved, is *malice prepense*, or *aforethought*. This term, however, is not restricted to spite or malevolence towards the deceased in particular, but, as we have stated in a preceding section, it is understood to mean that general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of a just sense of social duty, and fatally bent on mischief.[4] And whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes that it was

[1] Rex *v.* Lloyd, 1 C. & P. 301.

[2] 2 Hawk. P. C. ch. 25, § 84; 2 Russ. on Crimes, 800, 801; Commonwealth *v.* Springfield, 7 Mass. 13. By the common law, as recited in the Stat. 2 & 3 Ed. 6, cap. 24, § 2, if the mortal stroke or injury was given in one county, and the death happened in another, the party could not be tried in either; but, by that statute, provision was made that the trial might be had in either of the counties; and the like rule is adopted generally in the United States. The reason for this strictness, in regard to the place of trial, was, that anciently the Jurors decided causes upon their own private knowledge, as well as upon the evidence given by others, and, therefore, were summoned *de vicineto*. See Stephen on Pleading, pp. 153, 297, 301 (Am. ed. 1824).

[3] *Supra*, § 120.

[4] See *supra*, § 14; 4 Bl. Comm. 198; Foster, 256, 257; 2 Stark. Evid. 516; United States *v.* Ross, 1 Gall. 628.

done in malice; and it behooves the prisoner to show, from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder.[1] In showing this, the idea or meaning of what the law terms *malice*, is carefully to be kept in view; and the evidence is to be directed not merely to prove that he entertained no ill-will towards the deceased in particular, but to show that, in doing the act which resulted fatally, he was not unmindful, but, on the contrary, was duly considerate and careful of the lives and safety of all persons.

§ 145. Malice is said to be either *express* or *implied*. *Express malice* is proved by evidence of a deliberately formed design to kill another; and such design may be shown from the circumstances attending the act, such as the deliberate selection and use of a lethal weapon, knowing it to be such; a preconcerted hostile meeting, whether in a regular duel, with seconds, or in a street fight mutually agreed on, or notified and threatened by the prisoner; privily lying in wait, a previous quarrel or grudge, the preparation of poison, or other means of doing great bodily harm, or the like.[2] *Implied* or *constructive malice*, is an inference or conclusion of law upon the facts found by the Jury; and among these, the actual intention of the prisoner becomes an important fact; for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, from which the law raises the presumption of malice.[3] Thus, if one attempts to kill or maim A., and in the attempt, by accident, kills B., who was his dearest

[1] Rex *v.* Greenacre, 8 C. & P. 35, per Tindal, C. J.; 4 Bl. Comm. 200; *Supra*, § 13; York's case, 9 Met. 103; [See Commonwealth *v.* Hawkins, 3 Gray, 463; United States *v.* Mingo, 2 Curt. C. C. 1; United States *v.* Armstrong, Ib. 446.] Such is also the rule in Scotland. Alison's Crim. Law of Scotland, 48, 49. It also seems to be the rule of the Roman Civil Law. Omne malum factum prave semper præsumitur actum; nisi ratione personæ contraria omnino oriatur præsumptio. Mascard. De Probat. Concl. 223, n. 5. Si homicidium committatur, præsumitur in dubio dolose committi, licet potuisset patrari ad defensionem. Id. Concl. 1007, n. 62. Omne malum præsumitur pessimè factum, nisi probetur contrarium. Id. Concl. 1163, n. 23. [* If the design to kill be formed deliberately for ever so short a time before the infliction of the mortal wound, the offence is murder. State *v.* McDonnell, 32 Vt. 491; People *v.* Bealoba, 17 Cal. 389; Donnelly *v.* State, 2 Dutch, 463 and 601; State *v.* Shoultz, 25 Mis. 128. See the dissenting opinion of Clerke, J., in Sanchez *v.* People 22 N. Y. 147, to the point that under the influence of a strong passion a man may be so far *incapax doli* as to plan a deliberate homicide without legal malice prepense.]

[2] 4 Bl. Comm. 198, 199. And see The State *v.* Zellers, 2 Halst. 220; Stone's case, 4 Humph. 27. Where the crime is charged to have been committed with the actual and premeditated design to kill the deceased, this has been regarded as of the essence of the charge, and held necessary to be proved. The People *v.* White, 24 Wend. 520.

[3] 2 Stark. on Evid. 515, 516; Foster, 255 - 257.

friend or darling child; or if one, in the attempt to procure an abortion, causes the death of the mother; or if in a riot or fight, one of the parties accidentally kills a third person, who interfered to part the combatants and preserve the peace, the law implies malice, and the slayer is held guilty of murder.[1] And though other agents intervene between the original felonious act and its consummation, as, if A. gives poisoned food to B., intending that he should eat it and die, and B., ignorant of the poison, and against the will and entreaty of A., gives it to a child, who dies thereby,[2] or it is voluntarily tasted by an innocent third person, by way of convincing others of his belief that it is not poisoned, as in the case of the apothecary, into whose medicine, prepared by him for a sick person, another had purposely mingled poison,[3] the law still implies malice, and holds the wrong-doer guilty of murder.

§ 146. Malice is also a legal presumption, where an *officer of justice is resisted* while in the execution of his office, and in such resistance is killed. And this rule is extended to all executive officers, such as sheriffs, marshals, and their deputies, coroners, constables, bailiffs, and all others authorized to execute process and preserve the peace, and to all persons aiding them therein, as well as to the watchmen, and officers and men in the department of police, and their assistants. The rule also extends not only to the scene of action, and while the officer is engaged in the particular duty of his office which called him thither, but also to the time while he is going to and returning from the places *eundo*, *morando*, *et redeundo*. It also applies to all persons knowingly aiding, abetting, and taking part in the act of resistance. But the rule is limited to cases where the officer is in the due execution of his duty, having sufficient authority for the purpose; and where his official character or his right to act, is either actually known, or may well be presumed from the circumstances; or where the slayer, not knowing the officer or the circumstances, interfered to help a fight, by aiding one party against the other, and not to preserve the peace and prevent mischief.[4] This rule is also applied in the case of private persons killed in attempting to arrest a

[1] Foster, 261, 262; 1 Hale, P. C. 438, 441; 1 Hawk. P. C. b. 1, ch. 81, § 54.

[2] Saunders's case, Plowd. 473.

[3] Gore's case, 9 Rep. 81.

[4] See 1 Russ. on Crimes, pp. 532 – 538, 592 – 635, where this subject is fully treated; a more extended discussion of it being foreign from the plan of this work. See also Wharton's Amer. Crim. Law, pp. 398 – 403; *Supra*, § 123; Commonwealth *v.* Drew, 4 Mass. 391, 395.

criminal whenever the circumstances were such as to authorize the arrest.[1]

§ 147. Malice may also be proved by evidence of *gross recklessness of human life*, whether it be in the act of *wanton sport*, such as purposely, and with intent to do hurt, riding a *vicious horse* into a crowd of people, whereby death ensues; or by *casting stones*, or other heavy bodies, likely to create danger, over a wall or from a building, with intent to hurt the passers-by, one of whom is killed;[2] or where a parent or master *corrects a child* in a savage and barbarous manner, or with an instrument likely to cause death, whereof the child dies;[3] or where, in any manner, the life of another is knowingly, cruelly, and grossly endangered, whether by actual violence, or by inhuman *privation or exposure*, and death is caused thereby.[4] So, where death ensues in a combat upon *provocation sought by the slayer;* or upon a *punctilio* proposed by him, such as challenging the deceased to take a pin out of his sleeve if he dared.[5] So, if the provocation be by *words or gestures only*, and the stroke be with a lethal weapon, or in a manner likely to kill, this is evidence of malice; unless the words or gestures be accompanied by some act, indicating an intention of following them up by an actual assault; in which case the offence is reduced to manslaughter.[6] So, whatever be the provocation, if afterwards, and before the fatal stroke, sufficient time had elapsed for the *passion to subside*, this is proof that the killing was of malice.[7] But when *express malice* is once proved to have existed, *its continuance is presumed*, down to the time of the fatal act; and the burden of proof is on the slayer to repel this presumption by showing that the wicked purpose had afterwards, and before the fatal act, been abandoned.[8] And where such expressly malicious intent is proved,

[1] In what cases a private person may make an arrest, see *supra*, § 123, note.

[2] 3 Inst. 57, as limited by Holt, C. J., 1 Ld. Raym. 143; 1 Hale, P. C. 475; 4 Bl. Comm. 192, 200; 1 East, P. C. 231.

[3] Foster, 262; 1 Hale, P. C. 474; Grey's case, J. Kely. 64.

[4] See Alison's Crim. Law of Scotland, pp. 3, 4; 1 Hale, P. C. 431, 432; 1 East, P. C. 225; Palm. 548, per Jones, J.; Regina *v.* Walters, Carr. & Marshm. 164; 1 Russ. on Crimes, 488; Squire's case, Id. 490; Stockdale's case, 2 Lewin, C. C. 220; Rex *v.* Huggins, 2 Stra. 882; Castel *v.* Bambridge, 2 Stra. 854, 856.

[5] 1 Hale, P. C. 457.

[6] Watts *v.* Brains, Cro. El. 778; J. Kely. 131; 1 Hale, P. C. 455, 456; 1 Russ. on Crimes, 515; The State *v.* Merrill, 2 Dev. 269.

[7] The subject of provocation, and when it reduces the crime to manslaughter, has already been considered. See *supra*, §§ 122 – 127. And see The State *v.* Hill, 4 Dev. & Bat. 491.

[8] The State *v.* Johnson, 1 Ired. 354; The State *v.* Tilly, 3 Ired. 424; Shoemaker *v.* The State, 12 Ohio, 43; Commonwealth *v.* Green, 1 Ashm. 289. And see *ante*, Vol. 1, § 42.

the provocation immediately preceding it, whatever may have been its nature, is of no avail to mitigate the offence.

§ 148. It is a settled principle that *drunkenness* is not an excuse for a criminal act, committed while the intoxication lasts, and being its immediate result.[1] But the condition of the prisoner in this respect has sometimes been deemed a material inquiry, in order to ascertain whether he has been guilty of the specific offence of which he is indicted; as, for example, whether he be guilty of murder in the first or only in the second degree. Malicious homicides, it is well known, are distinguished by the statutes of several of the United States, into cases of the first and the second degrees, for which different punishments are assigned; and though there is some diversity in the descriptions of these cases, yet in substance it will be found, that murders, committed with the deliberate and premeditated purpose of killing, or in the attempt to commit any other crime, punished with death or perpetual confinement in the State penitentiary, are of the first degree; and that all others are murders of the second degree.[2] Whenever, therefore, in an indictment of murder in the first degree, the chief ingredient is the deliberately formed purpose of taking life, it has been held, in some of the United States, that evidence that the prisoner was so drunk as to be utterly incapable of forming such deliberately premeditated design, is admissible in proof that this offence has not been committed.[3] But whether this will be generally admitted as a sound and safe rule of criminal law, can be known only from future decisions in other States.

§ 149. It is not competent for the prisoner to give in evidence his own account of the transaction, related immediately after it happened, even though no person was present at the occurrence; for his account of it was no part of the *res gestæ*.[4]

[1] *Ante*, Vol. 2, § 374; *Supra*, § 6; The State *v.* Bullock, 13 Ala. 413. [If the prisoner relies upon delirium tremens as a defence, he must show that *at the time of the act* he was under a paroxysm of that disorder. State *v.* Sewell, 3 Jones, (Law), 245. See the whole subject of intoxication as a defence, thoroughly examined, by Denio and Harris, JJ., in The People *v.* Rogers, 18 N. Y. 9.]

[2] Murray's case, 2 Ashm. 41; Williams's case, Id. 69; Commonwealth *v.* Prison-keeper, Id. 227; Mitchell's case, 5 Yerg. 340; Dale's case, 10 Yerg. 551; Swan's case, 4 Humph. 136; Jones's case, 1 Leigh, 598; Whiteford's case, 6 Rand, 721; Clark's case, 8 Humph. 671.

[3] Cornwell's case, Mart. & Yerg. 157; Swan's case, 4 Humph. 136. And see The State *v.* McCants, 1 Speers, 384. [* In State *v.* Cross, 27 Wis. 332, it was held that drunkenness does not mitigate a crime in any respect; and, Richardson, J., dissenting, that the jury could not give it any weight in determining whether a homicide was wilful, deliberate, or premeditated.]

[4] The State *v.* Tilly, 3 Ired. 424. And see *ante*, Vol. 1, § 108. [* In a trial for

murder, evidence of the character of the deceased is admissible only where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not; People *v.* Lombard, 17 Cal. 316, or where, from the nature of the main proof in the case, such character becomes in some way involved in the *res gestæ*, State *v.* Dumphey, 4 Min. 438, but *contra*, Commonwealth *v.* Hilliard, 2 Gray, 294, and Same *v.* Meade, 12 Gray, 167. As to admissibility of evidence of the character of the deceased see Pfomer *v.* People, 4 Parker, C. R. N. Y. 558, where the American authorities are cited very fully by counsel, and Dukes *v.* State, 11 Ind. 557. In a capital trial, if error intervenes, it must be assumed to be injurious to the prisoner, and he is entitled to a reversal of judgment; the court has no power to affirm the case, merely because they are persuaded that upon the merits the judgment was right. People *v.* Williams, 18 Cal. 187. In the recent case of State *v.* McDonnell, 32 Vt. R. 591, 538, *et seq.*, the presumption of malice from the mere fact of killing is discussed, and some suggestions made in regard to qualifying the rule by submitting the inquiry, as matter of fact, to the consideration of the jury, in connection with the attending circumstances. And it is even suggested here, that the presumption of innocence, which exists in all criminal cases, is more controlling than any general natural presumption of malice arising from the mere fact of killing.]

# LARCENY.

[*§ 150. Definitions of larceny.
151. Allegations in indictment.
152. Name of prisoner and time of larceny not material to be proved. Larceny must be shown to have been in county where trial is had.
153. Precise value not material except in prosecutions under certain statutes.
154. Main points to be proved, — caption and asportation, with felonious intent, of goods of person named in indictment.
155. Goods must be severed from possession of owner, and be in possession of thief.
156. Restitution of goods does not do away the offence.
157. Intent of taking must be fraudulent.
158. Delivery by wife of owner to the prisoner *prima facie* evidence taking was not felonious.
159. Old rule that subsequent conversion by finder no evidence of felonious taking, qualified in modern times.
160. Obtaining goods from owner by stratagem or artifice, evidence of felonious taking.
161. Must be proved that goods were the property of the owner named, and taken from his possession.
162. Where prisoner was bailee, termination of bailment must be proved.
163. Wild animals and things savoring of the realty, not subject of larceny at common law.]

§ 150. The most approved *definition* of this offence, at common law, is that which is given by Mr. East, namely, "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a *felonious intent* to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner."[1] But

[1] 2 East, P. C. 553; 2 Russ. on Crimes, p. 2. And see Hammon's case, 2 Leach, C. C. (4th ed.), 1089, per Grose, J. The old English lawyers described larceny as Contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Bracton, lib. 3, c. 32, § 1. Fleta defines it in Bracton's own words. Fleta, lib. 1, c. 38, § 1. The Roman Civil Law was larger than the common law in its comprehension of this crime. Furtum est contrectatio fraudulosa, lucri faciendi gratiâ, vel ipsius rei, vel etiam *usûs* ejus *possessionisve*. Inst. lib. 4, tit. 1, § 1. In Sanders's edition of the Institutes (London, 1853), *ubi supra*, larceny is defined as follows: Furtum est contrectatio rei fraudulosa, vel ipsius rei, vel etiam usus ejus possessionisve. To this definition, the learned editor has appended the following note: "The definition of theft includes the term *contrectatio rei*, to show that evil intent is not sufficient; there must be an actual touching or seizing of the thing;

even this definition, though admitted by Parke, B., to be the most complete of any, was thought by him to be defective, in not stating what was the meaning of the word "*felonious*," in that connection; which he proceeded to say, "might be explained to mean that there is no color of right or excuse of the act"; adding that the "*intent*" must be to deprive the owner not temporarily, but permanently, of his property.[1]

§ 151. In the *indictment* for this offence, it is alleged, that *A. B.* (the prisoner), *on* ——, *at* ——, such and such goods (specifying the *things* stolen and their *value*), of the goods and chattels of *one C. D.* then and there being found, *feloniously* did *steal*, *take*, and *carry away*. And ordinarily these allegations are material to be proved by the prosecutor.[2]

§ 152. The mere *name of the prisoner*, as we have already seen,[3] needs no proof, unless it be put in issue by a plea in abatement. It is only necessary to show his identity with the person who committed the offence. Nor is the *time* material to be proved, unless the prosecution is limited by statute to a particular time. But the *place* must be so far proved, as to show that the larceny was committed in the county in which the trial is had.[4] And in legal contemplation, where goods are stolen in one county and carried into another, whether immediately or long afterwards, the offence

*fraudulosa*, to show that the thing must be seized with evil intent, and *rei*, *usus*, *possessionis*, to show the different interests in a thing that might be the subject of theft. It might seem that it would have made the definition more complete to have said *contrectatio rei alienæ*. Perhaps the word *alienæ* was left out because it was quite possible that the *dominus* or real owner of a thing should commit a theft in taking it from the possessor, as, for instance, in the case of a debtor stealing a thing given in pledge; and yet the *res* was scarcely *aliena* to the *dominus*. Many texts, after the words *contrectatio fraudulosa*, add *lucri faciendi gratia*, i. e. with a design to profit by the act, whether the profit be that of gaining a benefit for one's self, or that of inflicting an injury on another. These words are found in the passage of the Digest (xlvii. 2, 1, 3), from which this definition of theft is taken, but the authority of the manuscripts seems against admitting them here."

Even the *misuse* of a thing bailed was sometimes criminal. Placuit tamen, eos, qui rebus commodatis aliter uterenter quam utendas acceperint, ita furtum committere, si se intelligant id invito domino facere, eumque, si intellexisset, non permissurum. Inst. ub. sup. § 7. [* A man is not to be convicted of larceny if doubtful whether accessory before or after the fact. Reg. *v.* Munday, 2 F. & F. 170.]

[1] Regina *v.* Holloway, 2 C. & K. 942, 946; 1 Denison, C. C. 370; 13 Jur. 86; McDaniel's case, 8 Sm. & M. 401.

[2] [* "Stealing" imports larceny without the words "take and carry away." Gay *v.* State, 20 Texas, 504. An indictment for an attempt to commit larceny which charges the prisoner with attempting to steal "the goods and chattels of A.," without further specifying the goods intended to be stolen, is sufficiently certain. Reg. *v.* Johnson, 10 Cox, C. C. 13. A thief and a receiver of stolen goods may be jointly indicted. Commonwealth *v.* Adams, 7 Gray, 43.]

[3] *Supra*, § 22. [* An indictment stating the ownership to be in a firm, giving the firm name only, is sufficient. People *v.* Ah Sing, 19 Cal. 598.]

[4] For the reason of this ancient rule, see Co. Litt. 125 *a*; Stephen on Plead. 298–302.

may be prosecuted in either county; for every asportation is in law a new caption.[1] This rule, however, is limited to simple larceny; for if it be a compound offence, such as stealing from a store or dwelling-house, or if it be robbery from the person, *that* offence must be laid and proved in the county where the store or house was situated, or where the person was assaulted and robbed.[2] Whether the indictment for larceny can be supported, where the goods are proved to have been originally stolen in another State, and brought thence into the State where the indictment is found, is a point on which the decisions are contradictory.[3] But if the

[1] 1 Hale, P. C. 507, 508; Anon. 4 Hen. 7, 5 *b*, 6 *a*; Bro. Abr. Coron. p. 171; Commonwealth *v.* Dewitt, 10 Mass. 154; Cousin's case, 2 Leigh, 708; The State *v.* Douglass, 17 Maine, 193; The State *v.* Somerville, 21 Maine, 14, 19; Commonwealth *v.* Rand, 7 Met. 475. [* Myers *v.* People, 26 Ill. 173; Haskins *v.* People, 16 N. Y. 344.] That the lapse of time between the first taking and the carrying into another county, is not material. See Parkins's case, 1 Moody, C. C. 45; 1 Lewin, C. C. 316.

[2] 1 Hale, P. C. 507, 508; 2 Hale, P. C. 163; 1 Hawk. P. C. ch. 33, § 9; 2 Russ. on Crimes, 116.

[3] In the affirmative, see Commonwealth *v.* Cullins, 1 Mass. 116; Commonwealth *v.* Andrews, 2 Mass. 14; Commonwealth *v.* Rand, 7 Met. 475, 477; The State *v.* Ellis, 3 Conn. 185; Hamilton's case, 11 Ohio, 435; [* Watson *v.* State, 36 Miss. 593.] In the negative are [* Maynard *v.* State, 14 Ind. 427; State *v.* Reonnals, 14 La. An. 278;] Simmons *v.* The Commonwealth, 5 Binn. 617; 1 Leading Crim. Cases, 212; The People *v.* Gardiner, 2 Johns. 477; The People *v.* Schenck, Id. 479. In New York, the rule has since been changed by statute, upon which the case of The People *v.* Burke, 11 Wend. 129, was decided. A similar statute has been enacted in Alabama. The State *v.* Seay, 3 Stewart, 123; Murray *v.* The State, 18 Ala. 727. And see Simpson's case, 4 Humph. 456; Rex *v.* Prowes, 1 Moody, C. C. 349. But in Regina *v.* Madge, 9 C. & P. 29, which was decided upon the authority of Rex *v.* Prowes, the learned Judge apparently doubted the soundness of that case, in principle. [In the case of State *v.* Bartlett, 11 Vt. 650, where oxen were stolen in Canada and brought into Vermont, a conviction of larceny in the latter State was sustained. But see Commonwealth *v.* Uprichard, 3 Gray, 434. In that case the theft was committed in one of the British Provinces, and the goods brought into Massachusetts by the thief, who was there convicted of larceny. The Court, however, ordered a new trial, on the ground that the facts did not sustain such a charge; and Shaw, C. J., after stating that the main argument for the conviction rested on the rule, that when property has been stolen in one county and carried by the thief into another county, he may be indicted in either, said, "But in principle these cases are not strictly analogous. If the offence is committed anywhere in the realm of England, in whatever county, the same law is violated, the same punishment is due, the rules of evidence and of law governing every step of the proceedings are the same, and it is a mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same. A conviction or acquittal in any one county is a bar to any indictment in every other; so that the question is comparatively immaterial. . . . . It has, then, been argued that the same rule ought to apply to foreign governments as to the several States of the Union. . . . . Perhaps if it were a new question in this Commonwealth, this argument might have some force in leading to another decision in regard to the several American States. But supposing it to be established by these authorities as a rule of law in this Commonwealth, that goods stolen in another State and brought by the thief into this State, are to be regarded technically as goods stolen in this Commonwealth, we think this forms no sufficient ground for carrying the rule further and applying it to goods stolen in a foreign territory, under the jurisdiction of an independent government, between which and our own there is no other relation than that affected by the law of nations. Laws to punish crimes are essentially local, and limited to the boundaries of the States prescribing them. Indeed, this case, and the cases cited, proceed on the ground that the goods were actually stolen in this State. . . . . It is

original taking were such as the common law does not take cognizance of, as, if the goods were taken on the high seas, an indictment at common law cannot be sustained in any county.[1] It may here be added, that in order to render the offence cognizable in the county to which the goods are removed, it is necessary that they continue specifically the same goods; for if their nature be changed after they are stolen in one county, and before they are removed to another, the offence in the latter county becomes a new crime, and must be prosecuted as such. Thus, where a brass furnace, stolen in one county, was *there* broken in pieces, and the pieces were carried into *another* county, in which *latter* county the prisoner was indicted for larceny of a brass *furnace there;* he was acquitted upon this evidence; for it was not a brass *furnace*, but only *broken pieces of brass*, that he had in *that* county.[2] So, if a joint larceny be committed in one county where the goods are divided, and each thief takes his separate share into another county, this evidence will not support a joint prosecution in the latter county, for there the larceny was several.[3]

§ 153. Nor is it necessary to prove the *value* of the goods stolen, except in prosecuting under statutes which have made the value material, either in constituting the offence, or in awarding the punishment.[4] But the goods must be shown to be of some value,[5] at least to the owner; such as reissuable bankers' notes, or other notes completely executed, but not delivered or put in circulation;[6] though to third persons they might be worthless. It is not essential to prove a pecuniary value, capable of being represented by any current coin, or of being sold; it is sufficient if it be of valuable or economical utility to the general or special owner.[7]

only by assuming that bringing stolen goods from a foreign country into this State makes the act larceny here, that this allegation can be sustained; but this involves the necessity of going to the law in force in Nova Scotia to ascertain whether the act done there was felonious, and, consequently, whether the goods were stolen; so that it is by the combined operation of the force of both laws that it is made felony here."]

[1] 3 Inst. 113; 2 Russ. on Crimes, 119.

[2] Rex *v.* Halloway, 1 C. & P. 127.

[3] Rex *v.* Barnett, 2 Russ. on Crimes, 117.

[4] See Hope *v.* The Commonwealth, 9 Met. 134, [and State *v.* Arlin, 7 Foster (N. H.), 116.]

[5] Phipoe's case, 2 Leach, C. C. (4th ed.) 680. [* Commonwealth *v.* Riggs, 14 Gray, 376.]

[6] Rex *v.* Clark, Russ. & Ry. 181; 2 Leach, C. C. (4th ed.) 1036; Ranson's case, Id. 1090; Vyse's case, 1 Moody, C. C. 218; 2 Russ on Crimes, 79, note (*g*); Commonwealth *v.* Rand, 7 Met. 475. See Regina *v.* Powell, 14 Eng. Law & Eq. R. 575; 2 Denison, C. C. 403.

[7] Regina *v.* Bingley, 5 C. & P. 602; Regina *v.* Morris, 9 C. & P. 347; Rex *v.* Clark, Russ. & Ry. 181. See Regina *v.* Perry, 1 Denison, C. C. 69; 1 C. & K. 725; Regina *v.* Watts, 18 Jur. 192; 24 Eng. Law & Eq. R. 573; 6 Cox, C. C. 304. [In an indictment for receiving stolen goods, it is not necessary, in Rhode Island, to allege the value of the goods specifically. State *v.* Watson, 3 R. I. 114.]

If the subject is a bank-note, the stealing of which is made larceny by statute, it must be proved to be genuine ;[1] and if it be a note of a bank in another State, the existence of the bank must also be proved ; and this may be shown, presumptively, by evidence, that notes of that description were actually current in the country.[2]

§ 154. But the main points necessary to be proved in every indictment for this crime, are, 1st, *the caption and asportation ;* 2dly, *with a felonious intent ;* 3dly, *of the goods and chattels of another person* named or described in the indictment. And *first*, of the *caption and asportation.* This, in the sense of the law, consists in removing the goods from the place where they were before, though they be not quite carried away ; as if they be taken from one room into another in the owner's house, or removed from a trunk to the floor, or from the head to the tail of a wagon ; or if a horse be taken in one part of the owner's close and led to another, the thief being surprised before his design was entirely accomplished.[3] If it appear that every part of the thing taken was removed from the space which that part occupied, though the whole thing were not removed from the whole space which the whole thing occupied, it is a sufficient asportation.[4] On this ground, in the instances just mentioned, it was thus held. So, where the prisoner had lifted a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot, it was held a complete asportation.[5] And it was so held, where the prisoner ordered the hostler to lead from the stable and to saddle another man's horse, representing it as his own, but was detected while preparing to mount in the yard ;[6] for in each of these cases the prisoner had, for the moment, at least, the entire and absolute possession of the goods. But, on the other hand, where the prisoner was indicted for stealing four pieces of linen cloth, and it was proved that they were packed in a bale, which was placed lengthwise in a wagon, and that the prisoner had only raised and set the

[1] The State *v.* Tilley, 1 Nott & McC. 9 ; The State *v.* Cassados, Id. 91 ; The State *v.* Allen, R. M. Charlt. 518.

[2] 1 Hale, P. C. 508 ; 3 Inst. 108 ; Rex *v.* Simson, J. Kely. 31 ; Rex *v.* Coslet, 1 Leach, C. C. (4th ed.) 236 ; 2 East, P. C. 556 ; Rex *v.* Amier, 6 C. & P. 344 ; The State *v.* Wilson, Coxe, 439 ; Rex *v.* Walsh, 1 Moody, C. C. 14. And see Alison's Crim. Law of Scotland, pp. 265–270.

[3] The People *v.* Johnson, 4 Denio, 364 ; Regina *v* Manning, 17 Jur. 28 ; 14 Eng. Law & Eq. R. 548 ; 1 Pearce, C. C. 21. [* State *v.* Gazell 30 Mis. 92.]

[4] 2 Russ. on Crimes, 6.

[5] Rex *v.* Walsh, 1 Moody, C. C. 14.

[6] Rex *v.* Pitman, 2 C. & P. 423. Allowing a trunk of stolen goods to be sent as part of his luggage on board a vessel in which the prisoner had taken passage, has been held a sufficient reception by him of the stolen goods. The State *v.* Scovel, 1 Rep. Const. Ct. 274.

bale on one end, in the place where it lay, and had cut the wrapper down, but had not taken the linen out of the bale; this was resolved, for the above reason, to be no larceny.[1]

§ 155. It must also be shown that the goods were *severed from the possession or custody of the owner and in the possession of the thief*, though it be but for a moment.[2] Thus, where goods in a shop were tied by a string, the other end of which was fastened to the counter, and the thief took the goods and carried them towards the door as far as the string would permit, and was then stopped, this was held not to be a severance from the owner's possession, and consequently no felony.[3] And the like decision was given, where one had his keys tied to the strings of his purse, in his pocket, and the thief was detected with the purse in his hand, which he had taken out of the pocket, but it was still detained by the keys attached to the strings and hanging in the pocket.[4] Upon the same principle, in an indictment for robbery, where the prosecutor's purse, of which the prisoner attempted to rob him, was tied to his girdle, and in the struggle the girdle broke, and the purse fell to the ground, but was never touched by the prisoner, it was ruled to be no taking.[5] But where the prisoner snatched at the prosecutor's ear-ring, and tore it from her ear, but in the struggle it fell into her hair, where she afterwards found it, this was held a sufficient taking, for it was once in the prisoner's possession.[6]

§ 156. The crime being completed by the taking and asportation with a felonious intent, though the possession be retained but for a moment, it is obvious that *restitution of the goods to the owner*, though it be the result of contrition in the thief, does not do away the offence. Thus, if one, having taken another's purse, but finding nothing in it worth stealing, restores it to the owner, or throws it away; or, the contents being valuable, hands it back to the owner, saying, "if you value your purse, take it back again and give me the contents"; the taking, and consequently the offence, is nevertheless complete.[7]

[1] Cherry's case, 2 East, P. C. 556. See Regina *v.* Wallis, 3 Cox, C. C. 67.

[2] Where the prosecutor's servant took fat from his loft and placed it on a scale in his candle-room, endeavoring to induce the prosecutor to buy it as fat sent by the butcher; this was held a sufficient taking to constitute larceny. Regina *v.* Hall, 2 C. & K. 947; 1 Denison, C. C. 381.

[3] Anon. 2 East, P. C. 556.

[4] Wilkinson's case, 1 Hale, P. C. 508.

[5] 1 Hale, P. C. 533; 3 Inst. 69. And see Lapier's case, 2 East, P. C. 557; 1 Leach, C. C. (4th ed.) 360.

[6] Rex *v.* Lapier, 2 East, P. C. 557; 1 Leach, C. C. (4th ed.) 360; Regina *v.* Simpson, 6 Cox, C. C. 422; 29 Eng. Law & Eq. R. 530.

[7] 1 Hale, P. C. 533; 3 Inst. 69; 2 East, P. C. 557.

§ 157. In the *second* place, as to the *felonious intent*. And here a distinction is to be observed between larceny and mere *trespass*, on the one hand, and *malicious mischief* on the other. If the taking, though wrongful, be not fraudulent, it is not larceny, but is only a trespass; and ought to be so regarded by the Jury, who alone are to find the intent, upon consideration of all the circumstances. Thus, if it should appear that the prisoner took the prosecutor's goods openly, in his presence or the presence of other persons, and not by robbery; or, having them in possession, avowed the fact before he was questioned concerning them; or if he seized them upon a real claim of title; or took his tools to use, or his horse to ride, and afterwards returned them to the same place, or promptly informed the owner of the fact; or, having urgent and extreme necessity for the goods, he took them against the owner's will, at the same time tendering to him, in good faith, their full value in money; or took them by mistake arising from his own negligence; these circumstances would be pregnant evidence to the Jury that the taking was without a felonious intent, and therefore but a mere trespass.[1] On the other hand, where the prisoner's sole object was to destroy the property, from motives of revenge and injury to the owner, and without the expectation of benefit or gain to himself, this also is not larceny, but malicious mischief.[2] For it seems to be of the essence of the crime of larceny, that it be committed *lucri causâ*, or with the motive of gain or advantage to the taker; though it is not necessary that it be a pecuniary advantage; it is sufficient if any other benefit to him or to a third person, is expected to accrue. Thus, where one clandestinely took a horse from a stable and backed him into a coal-pit a mile off, thereby killing him, that his existence might not contribute to furnish evidence against another person who was charged with stealing the horse; this was deemed a sufficient *lucrum* or advantage to constitute the crime of larceny.[3] So, if the motive be to procure

[1] 1 Hale, P. C. 509; 2 East, P. C. 661–663. Where the goods were taken under a claim of right, if the prisoner appears to have had any fair color of title, or if the title of the prosecutor be brought into doubt at all, the Court will direct an acquittal; it being improper to settle such disputes in a form of process affecting men's lives, liberties, or reputation. 2 East, P. C. 659. [* State *v.* Bond, 8 Clarke (Iowa), 540.]

[2] Regina *v.* Godfrey, 8 C. & P. 563, per Lord Abinger. In the law of Scotland, if the property is *taken away*, with intent to detain it from the owner, the offence will amount to larceny, though the object was to destroy it, which is accomplished. The offence is reduced to malicious mischief, only where the property is maliciously destroyed without being removed. Alison's Crim. Law of Scotland, p. 273.

[3] Rex *v.* Cabbage, Russ. & Ry. 292; 1 Leading Crim. Cases, 436; 2 Russ. on Crimes, p. 3. But see Regina *v.* Godfrey, 8 C. & P. 553, where Lord Abinger seemed to think that the gain must be

personal ease, or a diminution of labor to the taker; as, where a servant, by means of false keys, took his master's provender and gave it to his horses with that intent; this also has been held sufficient.[1] But where a carrier broke open a parcel intrusted to him, and took therefrom two letters which he opened and read from motives of personal curiosity, or of political party zeal, and to prevent them from arriving in due season at their destination, this, however illegal, was deemed no felony.[2]

§ 158. If it appear that the goods were *delivered to the prisoner by the wife of the owner*, this is *primâ facie* evidence that the taking was not felonious; for as the wife has no present legal title to the goods of the husband, but only a contingent expectancy of title, she can exercise no control over them, except as his agent; and such agency, and the consent of the husband, may generally be presumed, in the absence of other circumstances, where the prisoner, acting in good faith, received the goods at her hands.[3] At most, in such a case, he would be but a mere trespasser. But this evidence would be rebutted by showing that the prisoner acted in bad faith, and with knowledge that the husband's consent was wanting, or with reason to presume that the taking was against his will; as, if he joined with her in clandestinely taking the goods away; or if he take both the wife and the goods; or if she, being an adulteress, living with the prisoner, bring the husband's goods alone to the prisoner, he knowingly receiving them into his personal custody and possession.[4]

§ 159. If the goods were *found* by the prisoner, the old rule was, that his subsequent conversion of them to his own use was no evi-

expected to accrue to the party himself. [* But it is held under the statute in Indiana that an intent to defraud the owner, though without benefit to the thief, is larceny. Keely *v.* State, 14 Ind. 36; also Hamilton *v.* State, 35 Miss. 214.]

[1] Rex *v.* Morfit, Russ. & Ry. C. C. 307; 1 Leading Crim. Cases, 438; 2 Russ. on Crimes, p. 3; Regina *v.* Handley, Car. & Marshm. 547; Regina *v.* Privett, 2 C. & K. 114; 1 Denison, C. C. 143; 2 Cox, C. C. 40. And see Regina *v.* Jones, 1 Denison, C. C. 188; 2 C. & K. 236; 2 Cox, C. C. 6; Regina *v.* Richards, 1 C. & K. 532; The State *v.* Hawkins, 8 Porter, 461.

[2] Regina *v.* Godfrey, 8 C. & P. 563.

[3] The People *v.* Schuyler, 6 Cowen, 572; Dalton's Just. 504. [* If a person merely assist a married woman who has not committed or intended to commit adultery, in carrying away the goods of her husband without the knowledge and consent of the latter; though with intent to deprive the latter of his property, he cannot be convicted of stealing the goods. Reg. *v.* Avery, 5 Jur. N. S. 577. See also Reg. *v.* Berry, 5 Jur. N. S. 228.]

[4] Ibid.; Regina *v.* Featherstone, 6 Cox, C. C. 376; 1 Leading Crim. Cases, 199; 26 Eng. Law & Eq. R. 570; Rex *v.* Tolfree, 1 Moody, C. C. 243; Regina *v.* Tollett, Car. & Marshm. 112; Regina *v.* Rosenberg, 1 Car. & K. 233. And see 1 Russ. on Crimes, 22, 23; 2 Russ. on Crimes, 87; Regina *v.* Thompson, 14 Jur. 488; 1 Denison, C. C. 549; 4 Cox, C. C. 191; Temple & Mew. C. C. 294; 1 Eng. Law & Eq. R. 542. [See Regina *v.* Avery, 22 Law Reporter, 166.]

dence of a felonious intent in the taking.[1] But this rule, in modern times, is received with some qualifications. For if the finder knows who is the owner of the lost chattel, or if, from any mark upon it, or from the circumstances under which it was found, the owner could reasonably have been ascertained, then the fraudulent conversion of it to the finder's use is sufficient evidence to justify the Jury in finding the felonious intent, constituting a larceny.[2] On this ground, hackney-coachmen and passenger-carriers have been found guilty of larceny, in appropriating to their own use the parcels and articles casually left in their vehicles by passengers ;[3] servants have been convicted for the like appropriation of money or valuables, found in or about their master's houses ;[4] and so it has been held where a carpenter converted to his own use a sum of money found in a secret drawer of a bureau, delivered to him to be repaired.[5] In a word, the omission to use the ordinary and well-known means of discovering the owner of goods lost and found, raises a presumption of fraudulent intention, more or less strong, against the finder, which it behooves him to explain and obviate ; and this is most readily and naturally done by evidence that he endeavored to discover the owner, and kept the goods safely in his custody until it was reasonably supposed that he could not be found ; or that he openly made known the finding, so as to make himself responsible for the value to the owner when he should appear.[6] In cases of this class, it is material for the prosecutor to

[1] 3 Inst. 108.

[2] Regina *v.* Thurborn, 1 Denison, C. C. 388; 2 C. & K. 831; 1 Temple & Mew. C. C. 67; Regina *v.* Preston, 2 Denison, C. C. 353; 5 Cox, C. C. 390; 8 Eng. Law & Eq. R. 589; Merry *v.* Green, 7 M. & W. 623; The State *v.* Weston, 9 Conn. 527; Regina *v.* Riley, 17 Jur. 189; 1 Pearce, C. C. 144; 14 Eng. Law & Eq. R. 544. But see The People *v.* Cogdell, 1 Hill, 94.

[3] Rex *v.* Lamb, 2 East, P. C. 664; Rex *v.* Wynne, Ib.; Rex *v.* Sears, 1 Leach, C. C. (4th ed.) 415, n. There is a clear distinction between property mislaid, that is, put down and left in a place to which the owner would be likely to return for it, and property lost. In Regina *v.* West, 6 Cox, C. C. 415; 29 Eng. Law & Eq. R. 525, a purchaser by mistake left his purse on the prisoner's stall in a market, without the prisoner or himself knowing it. The prisoner afterwards seeing it there, but not at the time knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner. It was held, that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner. In Regina *v.* Pierce, 6 Cox, C. C. 117, it was held, that the doctrine of lost property did not apply to the baggage of a passenger, left by him by mistake in a railway carriage, and if a servant of the company find it there, and do not take it to the station-house, or to a superior officer, but appropriates it to his own use, he is guilty of larceny. See Regina *v.* Dixon, 25 Law J. Rep. (N. S.), M. C. 39; 36 Eng. Law & Eq. R. 597; [Regina *v.* Davis, 36 Eng. Law & Eq. R. 607; The People *v.* Swan, 1 Parker, C. R. 1; The People *v.* Kaatz, 3 Id. 129.]

[4] Regina *v.* Kerr, 8 C. & P. 176.

[5] Cartwright *v.* Green, 8 Ves. 405; 2 Leach, C. C. (4th ed.), 952.

[6] 2 East, P. C. 665; Tyler's case, Breese, 227; The State *v.* Ferguson, 2 McMullan, 502.

show that the felonious intent was contemporaneous with the finding; for if the prisoner, upon finding the article, took it with the intention of restoring it to the owner when discovered, but afterwards wrongfully converted it to his own use, this is merely a trespass, and not a felony.[1] And the principle is the same, where he came to the possession in any other lawful manner; as, for example, where the goods were inadvertently left in his possession, or where he took the goods for safety, during a conflagration or the like, but afterwards wrongfully concealed and appropriated them to his own use.[2]

§ 160. A felonious intent may also be proved by evidence that the goods were *obtained from the owner by stratagem, artifice, or fraud.* But here an important distinction is to be observed between the crime of larceny, and that of obtaining goods by false pretences. For supposing that the fraudulent means used by the prisoner to obtain possession of the goods were the same in two separate cases, but in the one case the owner intended to part with his property absolutely, and to convey it to the prisoner, but in the other he intended only to part with the temporary possession, for a limited and specific purpose, retaining the ownership in himself; the latter case alone would amount to the crime of *larceny*, the

[1] Milburne's case, 1 Lewin, 251; Rex *v.* Leigh, 2 East, P. C. 694; The People *v.* Anderson, 14 Johns. 294. The rule of the Roman Civil Law substantially agrees with what is stated in the text. Qui alienum quid jacens, lucri faciendi causâ sustulit, furti obstringitur, sive scit cujus sit, sive ignoravit; nihil enim ad furtum minuendum facit, quòd cujus sit ignoret. Quòd si dominus id derelinquit, furtum non fit ejus, etiamsi ego furandi animum habuero; nec enim furtum fit, nisi sit [scit] cui fiat; in proposito autem nulli fit; quippe cum placeat Sabini et Cassii sententia existimantium, statim nostram esse desinere rem, quam derelinquimus. Sed si non fuit derelictum, putavit tamen derelictum furti non tenetur. Sed si neque fuit, neque putavit, jacens tamen tulit, non ut lucretur, sed redditurus ei cujus fuit, non tenetur furti. Dig. lib. 47, tit. 2, l. 43, § 4–7. [* Keely *v.* State, 14 Ind. 36.]

[2] Rex *v.* Leigh, 2 East, P. C. 694; The People *v.* McGarren, 17 Wend. 460. In Regina *v.* Riley, 17 Jur. 189; 14 Eng. Law & Eq. R. 544, the rule was thus stated by Pollock, C. B.: "If the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then, *animo furandi*, he disposes of the chattel, it is larceny. In the case before him, the prisoner had ignorantly driven off the prosecutor's lamb with his own flock, but afterwards feloniously sold it; and his conviction was held right. [The mere possession of goods which have been lost, is not *primâ facie* evidence that they were taken feloniously. Hunt *v.* The Commonwealth, 13 Grattan, 757.] [* A prosecutor found a check, and being unable to read showed it to the prisoner. The prisoner told him it was only an old check of the Royal British Bank, and kept it. He afterwards made excuses for not giving it up to the prosecutor, withholding it from him in the hopes of getting the reward that might be offered for it. It was held that these facts did not show such a taking as was necessary to constitute larceny. Reg. *v.* Gardner, 9 Cox, C. C. 253. A lady wishing to get a railway ticket finding a crowd at the pay place at the station asked the prisoner, who was nearer in to the pay place, to get a ticket for her, and handed him a sovereign to pay for it. He took the sovereign, intending to steal it, and instead of getting the ticket ran away. Held that he was guilty of larceny at common law. Reg. *v* Thompson, 9 Cox, C. C. 244.]

former constituting only the offence of *obtaining goods by false pretences*.[1] Thus, obtaining a loan of silver money, in exchange for gold coins to be sent to the lender immediately, but which the prisoner had not, and did not intend to procure and send, was held no felony, but a misdemeanor;[2] and so it was held, where the prisoner obtained the loan of money by means of a letter written by himself in the name of another person known to the lender.[3] But where the goods were obtained from the owner's servant, the prisoner falsely pretending that he was the person to whom the servant was directed to deliver them, it was held to be larceny.[4] For in the two former cases, the owner intended to part with his money; but in the latter case, the taking from the servant was tortious, he having only the care and custody of the goods for a special purpose. The rule is the same, where goods are fraudulently taken away during the pendency of a sale, but before it is completed by delivery;[5] or where they are obtained under the guise of receiving them in pledge;[6] the owner, in these cases, not intending, at the time, to divest himself of all legal title to the goods; but the prisoner intending to deprive him of that title.

§ 161. As every larceny includes a trespass, which involves a violation of another's possession, it is essential for the prosecutor to prove that the goods were the *property of the person named*[7] *as*

[1] [Regina *v.* Brown, 36 Eng. Law & Eq. R. 610.] [* In Watson *v.* State, 36 Miss. 593, it was held that the bill of sale, under which the prisoner claimed, being procured from a weak-minded old woman, under his care and protection, by false and fraudulent representations, without any consideration and under pretence of protecting the property for her benefit, was competent evidence to show the prisoner's original felonious intent, and, in pursuance of such intent, depriving the owner of the property, constituted the offence of larceny.]

[2] Rex *v.* Coleman, 2 East, P. C. 672; 1 Leach, C. C. (4th ed.), 339, n. And see Mowrey *v.* Walsh, 8 Cowen, 238.

[3] Rex *v.* Atkinson, 2 East, P. C. 673. So, where the defendant obtained goods of a tradesman by means of a forged order from a customer. Regina *v.* Adams, 1 Denison, C. C. 38.

[4] Rex *v.* Wilkins, 2 East, P. C. 673; [Regina *v.* Robins, 29 Eng. Law & Eq. R. 544; 6 Cox, C. C. 420; Commonwealth *v.* Wilde, 5 Gray, 83; The People *v.* Jackson, 3 Parker, C. R. 590.]

[5] Rex *v.* Sharpless, 1 Leach, C. C. (4th ed.), 108, 2 East, P. C. 675. And see Rex *v.* Aikles, 1 Leach, C. C. (4th ed.), 330; [Regina *v.* Morgan, 29 Eng. Law & Eq. R. 543.]

[6] Rex *v.* Patch, 1 Leach, C. C. (4th ed.), 273; 2 East, P. C. 678; Rex *v.* Moore, 1 Leach, C. C. (4th ed.), 354; Rex *v.* Watson, 2 Leach, C. C. (4th ed.), 730; 2 East, P. C. 679, 680. See also Regina *v.* Johnson, 2 Denison, C. C. 310; 14 Eng. Law & Eq. R. 570. [* See also State *v.* Watson, 41 N. H. 533, and State *v.* Humphrey, 32 Vt. 569.]

[7] If it appear that the owner is known by two names, indifferently, as, for example, Elizabeth and Betsey, the indictment will be proved, though only one of the names be stated therein. The State *v.* Godet, 7 Ired. 210. But an indictment for stealing the goods of A. is not supported by evidence that they were the goods of A. & B. who were partners, even though they were in A.'s actual possession. The State *v.* Hogg, 3 Blackf. 326; Commonwealth *v.* Trimmer, 1 Mass. 476. If the property is alleged to be in A. B., and it is proved to

*the owner*, and were taken from his *possession*.[1] The property may be either general or special, and the possession may be actual or constructive; proof of either of these being sufficient to support this part of the indictment. For the general ownership of goods draws after it the legal possession, though they were in the actual custody of a servant or agent; and the lawful possession, with a qualified property as bailee or agent,[2] is sufficient proof of ownership, against a wrongdoer.[3] But it must appear that the goods were *stolen* from the prosecutor; and if he, being a witness, cannot swear to the loss of the articles alleged to have been stolen from him, the prisoner must be acquitted.[4] And if they were stolen by a person unknown, but after a lapse of time were found in the possession of the prisoner, who gave *a reasonable and probable account* of the manner in which he came by them, it will be incumbent on the prosecutor to negative this explanation.[5]

be A. B. junior, it is sufficient. The State *v.* Grant, 22 Maine, 171; *Supra*, § 22. [* But a charge for larceny containing divers counts, and in each stating a different owner of the property, is good; the averment of ownership being but a part of the mode of describing the property. People *v.* Connor, 17 Cal. 361. The interest of mortgagees of personal property, entitled to the possession, is sufficient to support an indictment for larceny. State *v.* Quick, 10 Iowa, 451. In People *v.* Stone, 16 Cal. 369, it is held that a man may steal his own property, if, by taking it, it is his intent to charge a bailee with it.]

[1] [The owner of a watch placed it with a watchmaker for repairs. Another person fraudulently induced the latter to send it to the owner by mail, and then by fraud obtained it from the postmaster of the place to where it was sent. Held, that he was rightfully convicted of larceny from the owner. Regina *v.* Ray, 1 Dears. & Bell, 231.] [* It is not sufficient to allege that the goods stolen were the property of the estate of a deceased person. People *v.* Hall, 19 Cal. 425.]

[2] And although the goods have in fact been parted with by the bailee, but under a mistake, as his special property in them is not thereby devested, if a larceny of them be then committed, they may still be laid to be the property of the bailee. Regina *v.* Vincent, 2 Denison, C. C. 464; 9 Eng. Law & Eq. R. 548; 3 C. & K. 246.

[3] 2 East, P. C. 554; 1 Hawk. P. C. ch. 33, § 2, 3. Hence the general owner may be guilty of larceny, by stealing his own goods in the possession of his agent or bailee, with intent to charge the latter with the value. 2 East, P. C. 558; Palmer's case, 10 Wend. 165; Wilkinson's case, Russ. & Ry. 470.

[4] Regina *v.* Dredge, 1 Cox, C. C. 235. In Regina *v.* Burton, 6 Cox, C. C. 293; 24 Eng. Law & Eq. R. 551, the prisoner was found coming out of a warehouse, where a large quantity of pepper was kept, with pepper of a similar quality in his possession. He had no right to be in the warehouse, and on being discovered, said: "I hope you will not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk. It was held, that there was sufficient evidence to go to the Jury of the *corpus delicti*. Jervis, C. J., said: "It could not have been intended to lay down a principle in Regina *v.* Dredge"; and Maule, J., in pointing out the distinction between that case, and the case at bar, said: "There the prisoner was in a shop, where he might lawfully be; here he was where he ought not to be. The boy in that case kept to the property; the man in this abandoned it and threw it down. In this case the man admitted he had done something wrong."

[5] Regina *v.* Crowhurst, 1 Car. & Kir. 370; Hall's case, 1 Cox, C. C. 231; The State *v.* Furlong, 19 Maine, 225. And see 2 East, P. C. 656, 657; *Supra*, § 32; Regina *v.* Cooper, 3 C. & K. 318. [But see also Regina *v.* Wilson, 1 Dears. & Bell, 157.] [* Other goods may be proved to have been taken at the same time and found with those described in the indict-

§ 162. If the *goods are in the hands of a bailee* of the owner, and the bailee fraudulently applies them to his own use during the continuance of the bailment, this is not larceny, because here was no technical trespass, the possession of the bailee being lawful and exclusive, as against the general owner. But to constitute larceny in such a case, it is incumbent on the prosecutor to show that the contract of bailment was already terminated, either by lapse of time, or other circumstances. Ordinarily, the bailment, *primâ facie*, is proved by the prisoner, by evidence that the goods were legally in his possession at the time of the unlawful appropriation charged. This proof may be rebutted, 1st, by showing that the prisoner, though he had the custody of the goods, was a mere *servant* of the owner, having no special property therein, and being under no special contract respecting them; but his possession being that of his master; as, where a butler has charge of his master's plate, or a servant is sent on an errand with his master's horse, or goods, or money, or receives goods or money for his master, from another person, which he fraudulently applies to his own use; this is larceny.[1] Or, 2dly, it may be rebutted by showing that the prisoner *originally* obtained the possession of the goods with a felonious intent, *by fraud and deceit*, or by *threats or duress;* as, if he hired a horse, under pretence of a journey, but with intent, at the time, to convert him to his own use; or the like.[2] In such cases it must appear that the owner had no intention to part with his ultimate title or property in the goods, but only to part with the possession; for if he was induced by fraud to sell the goods,

ment, in the defendant's possession; and such goods may be exhibited to the Jury and taken by them to their room. Commonwealth *v.* Riggs, 14 Gray, 376. So, where there is a sufficient description of property to constitute the offence, evidence may be given of the taking of other property insufficiently described, as a circumstance attending the offence. Haskins *v.* People, 16 N. Y. 344.]

[1] 2 East, P. C. 564–570; 1 Hale, P. C. 506, 667, 668; United States *v.* Clew, 4 Wash. 700; Commonwealth *v.* Brown, 4 Mass. 580, 586; The State *v.* Self, 1 Bay, 242; The People *v.* Call, 1 Denio, 120; 2 Russ. on Crimes, 153–166; Regina *v.* Hayward, 1 Car. & Kir. 518; Regina *v.* Goode, Car. & M. 582; Regina *v.* Beaman, Id. 595; Regina *v.* Jones, Id. 611; Rex *v.* M'Namee, 1 Moody, C. C. 368; Regina *v.* Watts, 14 Jur. 870; 1 Eng. Law & Eq. R. 558; Rex *v.* Spear, 2 Leach, C. C. (4th ed.), 825; 2 Russ. on Crimes, 155, 156; Regina *v.* Hawkins, 1 Denison, C. C. 584; 14 Jur. 513; 1 Eng. Law & Eq. R. 547; Rex *v.* M'Namee, *ubi supra*, has been doubted. See Regina *v.* Hey, 2 C. & K. 988; Temple & Mew. C. C. 213. [The landlord of a hotel offered a gun to a guest to go out shooting. The guest accepted the offer and went out, and did not return with the gun, but disposed of it for his own use. Held to be larceny. Richards *v.* The Commonwealth, 13 Grattan, 803.]

[2] Rex *v.* Pear, 2 East, P. C. 685; Rex *v.* Charlewood, Id. 689; Rex *v.* Semple, Id. 691; 1 Leach, C. C. (4th ed.), 420; Starkie's case, 7 Leigh, 752; J. Kely. 82; Blunt's case, 4 Leigh, 689; The State *v.* Gorman, 2 N. & McC. 90; Banks's case, Russ. & Ry. 441; Regina *v.* Brooks, 8 C. & P. 295; Regina *v.* Thristle, 2 C. & K 842. Regina *v.* Brooks, *ubi supra*, is over ruled. Regina *v.* Janson, 4 Cox, C. C. 82.

the prisoner, as we have seen, is only guilty of a misdemeanor.[1] Or, 3dly, the evidence of bailment may be rebutted by proof that *the contract had been determined by the wrongful act of the bailee*, previous to the act of larceny. A familiar illustration of this point is where a carrier breaks open a box or package intrusted to him. Here the breaking open of the box is an act clearly and unequivocally evincing his determination and repudiation of the bailment, and his custody of the goods becomes thereby in law the possession of the owner; after which, his conversion of part or all of the goods to his own use is a felonious caption and asportation of the goods of another, which constitutes the crime of larceny. If he sells the entire package, in its original state, without any other act, though the privity of contract is thereby determined, yet here is no caption and asportation of that which at the time was the entire property of another, but only a breach of trust.[2] And where several articles constitute the subject of an entire contract

[1] *Supra*, §§ 1, 160. And see Rex *v.* Robson, Russ. & Ry. 413; Rex *v.* Williams, 6 C. & P. 390; Regina *v.* Wilson, 8 C. & P. 111; Regina *v.* Rodway, 9 C. & P. 784.

[2] The distinction between the two cases is clear, though exceedingly refined; and is well explained by Mr. Starkie. "The distinction," he observes, "which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may, at first sight, appear somewhat paradoxical and unreasonable, that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be well warranted, when it is considered how necessary it is to preserve the limits which separate the offence of larceny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit; and that the distinction results from a strict application of the rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, so would every other bailee or trustee, and the offence of larceny would be confounded with that of a mere breach of trust, and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larceny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier, being inconsistent with the object of the bailment, determines the privity of contract; but then the question arises, what caption and asportation constitute the larceny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient; and the act of conversion itself, such as the delivery of the whole of the entire package to a purchaser, is insufficient, because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or, as it seems, of the whole of the goods, is a complete larceny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated. 1 Hale, P. C. 504, 505; 2 East, P. C. 697. Kelynge, C. J., explains it upon the ground of a presumed previous felonious intention on the part of the carrier, when he first took the goods; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package." 2 Stark. Evid. 448, n. (*x*). And see 1 Hale, P. C. 504, 505; 2 East, P. C. 664, 685, 693, 694, 697, 698; Rex *v.* Brazier, Russ. & Ry. 337; 2 Russ. on Crimes, 59; Rex *v.* Madox, Russ. & Ry. 92; Cheadle *v.* Buell, 6 Ohio, 67; Rex *v.* Jones, 7 C. & P. 151; Regina *v.* Jenkins, 9 C. & P. 38; Regina

of bailment, such as bags of wheat, to be kept in a warehouse;[1] barilla or corn, to be ground;[2] several packages, or a quantity of staves, to be carried;[3] or garments to be sold,[4] the abstraction of one of the parcels, or articles, or a portion of the bulk, and converting it to the use of the bailee, has been held to amount to a breaking of bulk, sufficient to terminate the bailment, and to constitute larceny.[5] Or, 4thly, the evidence of bailment may be rebutted by proof that the contract had previously been *terminated by performance*, according to the intent of the parties; as, where goods, sent by a carrier, had reached their place of destination, and been there delivered; but afterwards were stolen by the carrier.[6] But it is to be noted, that proof of the delivery, or that the bailee had parted with the possession, is material; for if goods are borrowed or hired for a special purpose, as, for example, a horse to go to a particular place, and after that purpose is accomplished, and before the goods are returned to the owner, the hirer, or borrower, upon a new and not an original intention, fraudulently converts them to his own use, this is held not to amount to the crime of larceny.[7]

§ 163. By the common law, neither *wild animals* unreclaimed and unconfined, nor things *annexed to or savoring of the reality* and unsevered, could be the subject of larceny. If the animal were already dead, or reclaimed, or captured and confined, it should be so alleged in the indictment; for if the allegation be general for stealing such an animal, which is known to be *feræ naturæ*, it will be presumed to have been alive and at large; and evidence of the stealing a dead or tamed animal will not support the indictment.[8] And in regard to things once part of the realty, it must be proved

*v.* Cornish, 6 Cox, C. C. 432; [* State *v.* Fairclough, 29 Conn. 47.] [In Nichols *v.* The People, 17 New York, 114, it was held that a carrier, who had converted to his own use several pigs of iron out of a larger number placed in his charge, might be convicted of larceny. Denio and Comstock, JJ., dissenting.]

[1] Brazier's case, Russ. & Ry. C. C. 337.

[2] Commonwealth *v.* James, 1 Pick. 375; 1 Roll. Abr. 73.

[3] Commonwealth *v.* Brown, 4 Mass. 580; Dame *v.* Baldwin, 8 Mass. 518; Rex *v.* Howell, 7 C. & P. 325. So is the law of Scotland. Alison's Crim. Law of Scotland, p. 252.

[4] Regina *v.* Poyser, 2 Denison, C. C. 233; 5 Cox, C. C. 241; 4 Eng. Law & Eq. R. 565.

[5] The Roman Law proceeded on a similar principle. Si rem apud te depositam, furti faciendi causâ contrectaveris, desino possidere. Dig. lib. 42, tit. 2, l. 3, § 18. See acc. Regina *v.* Poyser, 2 Denison, C. C. 233; 5 Cox, C. C. 241; 4 Eng. Law & Eq. R. 565; 3 Chitty, Crim. Law, 920; Whart. Am. Crim. Law, 571–576.

[6] 1 Hale, P. C. 504, 505.

[7] Rex *v.* Banks, Russ. & Ry. 441, overruling Rex *v.* Charlewood, 2 East, P. C. 690; 1 Leach, C. C. (4th ed.) 409, as to this point. And see 2 Russ. on Crimes, 56, 57; Regina *v.* Thristle, 2 C. & K. 842.

[8] Rough's case, 2 East, P. C. 607; Edwards's case, Russ. & Ry. C. C. 497; Rex *v.* Halloway, 7 C. & P. 128; Id. 127, note (b). And see Commonwealth *v.* Chace, 9

that they were severed before the act of larceny was committed upon them If the severance and asportation were one continued act of the prisoner, it is only a trespass; but if the severance were the act of another person, or if, after a severance by the prisoner, any interval of time elapsed, after which he returned and took the article away, the severance and asportation being two distinct acts, it is larceny.[1]

Pick. 15; 1 Leading Crim. Cases, 66; Rex *v.* Brooks, 4 C. & P. 131; 1 Hawk. P. C. ch. 33, § 26, p. 144; Regina *v.* Cheafor, 5 Cox, C. C. 367; 1 Leading Crim. Cases, 64; 8 Eng. Law & Eq. R. 598; 2 Denison, C. C. 361; Rex *v.* Howell, Denison, C. C. 362, note; 1 Leading Crim. Cases, 65, note; [* Pea-fowls are subjects of larceny. An indictment for stealing any animal, which does not state whether it is dead or alive, is not supported by evidence that it was dead when stolen; even if it is an animal which has the same appellation whether dead or alive. Commonwealth *v.* Beaman, 8 Gray, 497. A dog was not the subject of larceny at common law. People *v.* Campbell, 4 Parker, C. R. N. Y. 386. Oysters planted in a bed, and not naturally growing there, are subjects of larceny. State *v.* Taylor, 3 Dutch, 117. And the indictment need not aver that they had been gathered, or were in the actual possession of the prosecutor. Ib.]

[1] 1 Hale, P. C. 510; 2 East, P. C. 587; Lee *v.* Risdon, 7 Taunt. 191, per Gibbs, C. J. The Roman Law does not seem to recognize this distinction, but adjudges the act of severance and asportation to be theft in both cases. Eorum quæ de fundo tolluntur, utputa arborum, vel lapidum, vel arenæ, vel fructuum, quos quis fraudandi animo decerpsit, furti agi posse nulla dubitatio est. Dig. lib. 47, tit. 2, l. 25, § 2. [* To take an impression of a warehouse-key for the purpose of having a false key made, with the intent of entering the house and stealing therefrom, is an attempt to commit larceny, whether the party intend to steal himself or to procure another to do it, Benning, J., dissenting. Griffin *v.* State, 26 Geo. 493.]

## LIBEL.

[* § 164. Difficulty of defining the offence.
165. As committed against an individual, defined by statute in some states.
166. What the indictment sets forth.
167. In written or printed libel, proof must agree with indictment in every particular essential to identity.
168. Publication, in itself defamatory, *primâ facie* evidence of malice.
169. Publication, sufficient to constitute the crime.
170. Participation in act of publication sufficient, as writing libel, printing it, &c.
171. Party participating in publication guilty, though ignorant of contents of libel.
172. Dictating or communicating libel to another, with view to publication, sufficient.
173. Publication must be proved to have been made within county where trial is had.
174. Colloquium, how proved.
175. Innuendoes, not subject of proof.
176. Truth of defamatory publication generally, by statute, a justification.
177. But this is properly confined to libels defamatory of the person.
178. Defences.
179. Right of the jury. In United States may find general verdict.]

§ 164. The difficulty of defining this offence at common law has often been felt and acknowledged. Lord Lyndhurst thought it hardly possible to define it; observing that any definition he had ever seen was faulty, and wanting in the requisites of a logical definition, either in its vagueness and generality, or in its omission of essential particulars.[1] Yet all text writers on this subject have undertaken to define, or at least to describe it, and this with a degree of precision probably sufficient for all practical purposes. According to Russell, and to the authorities to which he refers, the crime of Libel and Indictable Slander is committed by the

[1] See his testimony before the Lords' Committee, in Cooke on Defamation, App. No. 2, p. 482. Mr. Hamilton ventured to define it as "a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals." *Arguendo*, in The People *v.* Croswell, 3 Johns. Cas. 337, 354. This was subsequently approved by the Court, as a definition "drawn with the utmost precision." See Steele *v.* Southwick, 9 Johns. 215; Cooper *v.* Greeley, 1 Denio, 347. Mr. Starkie, in more general terms, defines the offence as "the wilful and unauthorized publication of that which immediately tends to produce mischief and inconvenience to society." But this comprehensive definition he afterwards expands into the several species of this crime, which he describes with sufficient particularity. See 2 Stark. on Slander, p. 129.

publication of writings blaspheming the Supreme Being, or turning the doctrines of the Christian religion into contempt and ridicule; — or tending, by their immodesty, to corrupt the mind, and to destroy the love of decency, morality, and good order; — or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of the law and government of the country; — to degrade the administration of government or of justice; — or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; — and by malicious defamations, expressed in printing or writing, or by signs or pictures tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule.[1] This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which, it is believed, are indictable in the United States, either at common law or by virtue of particular statutes.

§ 165. In several of the United States this offence, in its more restricted acceptation, as committed against an individual, has been *defined by statute*. Thus, in Maine, it is enacted, that "a libel shall be construed to be the malicious defamation of a person, made public either by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one that is dead, and tending to scandalize or provoke his surviving relatives or friends."[2] Definitions of the like import are found in the statute books of some other States;[3] and would doubtless be recognized in all, as expressive of the law of the land; the common law, in regard to what constitutes a libel, being adopted in all the States, except so far as it may have been altered by statutes or constitutional provisions.[4]

[1] Russ. on Crimes, 220. And see 2 Stark. on Slander, pp. 129 - 224; Cooke on Defamation, pp. 69 - 80; Holt on Libels, pp. 74 - 249; 2 Kent, Comm. 16 - 26.

[2] See Maine Rev. Stats. 1840, ch. 165, § 1.

[3] Such, in substance, are the definitions in *Iowa*, Rev. Code of 1851, ch. 151, art. 2767; *Arkansas*, Rev. Stats. 1837, Div. 8, ch. 44, art. 2, § 1, p. 280; *Georgia*, Prince's Dig. pp. 643, 644; Hotchk. Dig. p. 739; Cobb's Dig. Vol. 2, p. 812; *California*, Stat. 1850, ch. 99, § 120; *Illinois*, Rev. Stats. 1845, Crim. Code, § 120.

[4] Commonwealth *v.* Chapman, 13 Met. 68; Dexter *v.* Spear, 4 Mason, 115;

§ 166. The *indictment* for this offence sets forth the libellous *writing or act*, — the *malicious intent*, — its *object*, or *the person* whom it was designed to disgrace or injure, — the *publication* of the writing, with proper *inuendoes*, referring the libellous matter to its alleged object, — and the *place* of publication. The place, however, is not necessary to be proved, except so far as it is essential to the jurisdiction, and where it is locally descriptive of the offence.[1]

§ 167. In the case of a *written or printed libel*, the proof must agree with the indictment in every particular essential to the identity, such as dates, names of persons, and the precise words used, a variance in any of these particulars being fatal.[2] But a literal variance alone is not fatal, where the omission or addition of a letter does not make it a different word.[3] Thus, "undertood," for "understood," [4] "reicevd," for "received," [5] and the like, are immaterial variances; and a diversity in the spelling of a name is not material, where it is *idem sonans*, as, "Segrave," for "Seagrave." [6] This rule applies more strictly to cases where the libellous writing is set forth *in hæc verba*, as it ought always to be, where it is in the power of the prosecutor.[7] But where the paper is in the prisoner's exclusive possession, or has been destroyed by him, and perhaps in some other cases, where its production is out of the power of the prosecutor (in all which cases it should be so stated in the indictment), inasmuch as it may be sufficient to state the purport or substance of the libel, secondary evidence may be received of its contents.[8]

White *v.* Nichols, 3 How. S. C. R. 266, 291; Commonwealth *v.* Clapp, 4 Mass. 163, 168; Usher *v.* Severance, 20 Maine, 9; Hillhouse *v.* Dunning, 6 Conn. 391; Steele *v.* Southwick, 9 Johns. 214; Colby *v.* Reynolds, 6 Verm. 489; McCorkle *v.* Binns, 5 Binn. 340; The State *v.* Farley, 4 McCord, 317; Torrance *v.* Hurst, Walker, 403; Armentrout *v.* Moranda, 8 Blackf. 426; Newbraugh *v.* Curry, Wright, 47; Taylor *v.* Georgia, 4 Georgia, 14; The State *v.* White, 9 Ired. 418; 7 Ired. 180; Robbins *v.* Treadway, 2 J. J. Marsh. 540; 1 Kent, Comm. Lect. 24, p. 620 (7th ed.); The State *v.* Henderson, 1 Rich. 179.

[1] *Supra*, § 12; *infra*, § 173.

[2] See *ante*, Vol. 1, §§ 56, 58, 65 *et seq.*; 2 Russ. on Crimes, 788. But the omission of the date and signature at the end of the libel, not affecting the meaning, is not a variance. Commonwealth *v.* Harmon, 2 Gray, 289. [An indictment alleging that defendant published a libel on November 21st, may be supported by evidence of its publication in a newspaper dated November 19th. *Aliter*, if it had been alleged to have been published in a newspaper dated the 21st. Commonwealth *v.* Varney, 10 Cush. 402.]

[3] Regina *v.* Drake, 2 Salk. 660, per Powers, J., approved, as "the true distinction," per Ld. Mansfield, Cowp. 230; The State *v.* Bean, 19 Verm. 530; The State *v.* Weaver, 13 Ired. 491.

[4] Rex *v.* Beach, Cowp. 229.

[5] Rex *v.* Hart, 2 East, P. C. 977; 1 Leach, C. C. (4th ed.), 145.

[6] Williams *v.* Ogle, 2 Stra. 889.

[7] Commonwealth *v.* Wright, 1 Cush. 46; 1 Leading Crim. Cases, 296; Wright *v.* Clements, 3 B. & Ald. 503; 1 Leading Crim. Cases, 312.

[8] Commonwealth *v.* Houghton, 8 Mass 107, 110; The State *v.* Bonney, 34 Maine,

§ 168. In the *proof of malice*, it is not necessary, in the opening of the case on the part of the government, to adduce any particular evidence to this point, where the publication or *corpus delicti*, as charged, is in itself defamatory; for in such cases the law infers malice, unless something is drawn from the circumstances attending it to rebut that inference.[1] But where the intent is equivocal, or the act complained of is not plainly and of itself defamatory, some substantive evidence of malice should be offered.[2] Such evidence is also necessary on the part of the prosecution, where the defence set up to the charge of a libellous publication is, that it was privileged.[3] If the communication was of a

223; The People *v.* Kingsley, 2 Cowen, 522. And see United States *v.* Britton, 2 Mason, 464, 467, 468; Johnson *v.* Hudson, 7 Ad. & El. 233, n.

[1] Rex *v.* Creevey, 1 M. & S. 273, 282; Rex *v.* Ld. Abingdon, 1 Esp. 226; Jones *v.* Stevens, 11 Price, 235; White *v.* Nichols, 3 How. S. C. Rep. 291. Malice, in this connection, does not necessarily imply personal ill-will. The Commonwealth *v.* Bonner, 9 Met. 410; Commonwealth *v.* Snelling, 15 Pick. 340.

[2] Stuart *v.* Lovell, 2 Stark. R. 93. See, as to the proof of malice, *ante*, Vol. 2, § 418.

[3] White *v.* Nichols, 3 How. S. C. Rep. 286. In this case, privileged communications were distributed, by Mr. Justice Daniel, into four classes: "1. Whenever the author and publisher of the alleged slander acted in the *bonâ fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A. as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested. 2. Any thing said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances." Ibid. The learned Judge, in delivering the opinion of the Court, concluded the first part of his elaborate investigation with the following comprehensive statement of its results: "The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *primâ facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining, beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore, *primâ facie*, relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence as to such cases is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal may have been

class absolutely privileged, proof of actual malice is inadmissible, as it constitutes no answer or bar to the privilege.[1] Such is the case of matter necessarily published in the due discharge of official or public duty. But where the publication is only *primâ facie* privileged, as in the case of a character given of a servant, or of advice confidentially given, or the like, the defence of privilege may be rebutted by proof of actual malice.[2] Thus, it may be shown, that the same communication was voluntarily made by the defendant on other occasions, when it was not called for; or that he has at other and subsequent times published other libelous matter relating to the same subject, or other copies of the same libel.[3] Other publications, also, contained in the same paper, and relating to the same libel, or expressly referred to in the writing set forth in the indictment and explanatory of its meaning, may be read in evidence, they being in the nature of parts of the *res gestæ*, and showing the real meaning and intent of the party.[4]

§ 169. Though the indictment for a libel in writing or print should charge the defendant with having *composed*, *written*, *printed*, and *published* it, yet it is not necessary to prove all these; for it is not perfectly clear that it is legally criminal to compose and write libellous matter if it be not published;[5] and it is well settled that the charge will be supported by proof of the publication alone,[6] this being of the essence of the offence. *Publication consists* in

the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice." Ibid. p. 291. As to privileged communications, see further, *ante*, Vol. 2, §§ 421, 422; [Farnsworth *v.* Storrs, 5 Cush. 412; Sheckell *v.* Jackson, 10 Id. 25; Barrows *v.* Bell, 7 Gray, 301; Van Wyck *v.* Aspinwall, 17 N. Y. 190; Gassett *v.* Gilbert, 6 Gray, 94; Davison *v.* Duncan, 40 Eng. Law & Eq. R. 215.]

[1] Cooke on Defamation, p. 148.

[2] Sands *v.* Robinson, 12 S. & M. 704.

[3] Rogers *v.* Clifton, 3 B. & P. 587; Bromage *v.* Prosser, 4 B. & C. 247, 256; Stuart *v.* Lovell, 2 Stark. R. 93; Chubb *v.* Westley, 6 C. & P. 436; Finnerty *v.* Tipper, 2 Campb. 72; Thomas *v.* Croswell, 7 Johns. 264, 270; Rex *v.* Pearce, 1 Peake, Cas. 75; Plunkett *v.* Cobbett, 5 Esp. 136.

[4] Rex *v.* Lambert, 2 Campb. 398; Cook *v.* Hughes, Ry. & M. 112; Rex *v.* Slaney, 5 C. & P. 213.

[5] In Rex *v.* Paine, 5 Mod. 163, 167, it was held that the making of a libel was an offence, though it never be published. In Rex *v.* Burdett, 4 B. & Ald. 95, Lord Tenterden, and Holroyd, J., were of opinion that the writing of a libel with intent to defame, was of itself a misdemeanor; though the latter seemed to lay stress on the fact of a subsequent publication, as evidence of the intent. Best, J., said nothing on this point, as it was not necessary to the judgment; and Bayley, J., after stating it, observed that the case seemed hardly ripe for discussing that question. See also 1 Russ. on Crimes, 248; 2 Stark. on Slander, 312; 1 Hawk. P. C. ch. 73, § 11; Roscoe, Crim. Evid. 654.

[6] Rex *v.* Hunt, 2 Campb. 583; Rex *v.* Williams, Id. 646.

communicating the defamatory matter to the mind of another, whether it be privately to the party injured alone, with intent to provoke him to a breach of the peace,[1] or to others, with intent to injure the individual in question, or to perpetrate more extensive mischief. And, generally speaking, all persons who knowingly participate in the act of publication, are equally liable to prosecution for this offence.

§ 170. It will be sufficient, therefore, in *proof of publication*, to show that the defendant wrote the libel which is found in another's possession, until this fact is otherwise accounted for;[2] and if a letter containing a libel have a postmark upon it and the seal be broken, this is *primâ facie* evidence of its publication.[3] If the libel be in a newspaper, the act of printing it, if not otherwise explained by circumstances,[4] delivering a copy to the proper officer at the stamp-office,[5] and payment to the stamp-officer for the duties on the advertisements in the same paper,[6] have each been held sufficient evidence of publication. Proof that the printed libel was sold in the shop of the defendant, though it were without his actual knowledge, the sale being by a servant, in his absence, is sufficient evidence of publication by the master, unless he can rebut it by proof that the sale was not in the ordinary course of the servant's employment, and that the book was clandestinely brought into the shop and sold, or that the sale was contrary to his express orders, and that some deceit or surprise was practised upon him; or that he was absent under such circumstances as utterly negatived any presumption of privity or connivance on his part; as, for example, if he were in prison, to which his servants could have no access, or the like.[7] In these cases, the agency of the servant may be proved by evidence of his general employment in that department of the defendant's business; but where the act of publication, whether by sale or by writing and sending a letter, was done by another not thus generally employed, the agency must be particularly proved.[8]

[1] 1 Hawk. P. C. ch. 73, § 11; 1 Russ. on Crimes, 244, 250; The State *v.* Avery, 7 Conn. 267, 269; Rex *v.* Wegener, 2 Stark. R. 245; Hodges *v.* The State, 5 Humph. 112.

[2] Rex *v.* Beare, 1 Ld. Raym. 414; Lamb's case, 9 Co. 59; Regina *v.* Lovett, 9 C. & P. 462.

[3] Shipley *v.* Todhunter, 7 C. & P. 680; Warren *v.* Warren, 1 C. M. & R. 250. And see *ante*, Vol. 1, § 40.

[4] Baldwin *v.* Elphinstone, 2 W. Bl. 1038.

[5] Rex *v.* Amphlit, 4 B. & C. 35.

[6] Cook *v.* Ward, 6 Bing. 409.

[7] *Ante*, Vol. 1, § 36, and cases there cited; Holt on Libels, 293–296; Woodfall's case, 1 Hawk. P. C. ch. 73, § 10, n.; 2 Stark. on Slander, 30 34; Rex *v.* Almon, 5 Burr. 2686; 1 Leading Crim. Cases, 241; Commonwealth *v.* Nichols, 10 Met. 259, Commonwealth *v.* Buckingham, 2 Wheeler C. C. 198; Thacher's Crim. Cases, 29.

[8] Harding *v.* Greening, 8 Taunt. 42; *Ante*, Vol. 2, tit. AGENCY, §§ 64, 65.

§ 171. If the evidence of publication be an *admission of the defendant* that he was the author of the libel, "errors of the press and some small variations excepted," the burden of proof is on the defendant to show that there were material variances.[1] He who procures another to publish a libel, is guilty himself of the publication; and he who disperses a libel is also guilty of the publication, though he did not know its contents. The apparent severity of this rule, and of that which renders the owner of a shop responsible as the publisher of libels sold therein without his knowledge, is justified on the score of high public expediency, or necessity, to prevent the circulation of defamatory writings, which, otherwise, might be dispersed with impunity.[2]

§ 172. Evidence that the defendant *dictated the libel to another*, or communicated it verbally to him, *with a view to its publication*, is also sufficient to charge him with the publication. Thus, where the defendant, meeting the reporter for one of the public prints, communicated to him the defamatory matter, saying that "it would make a good case for the newspaper"; and accompanied him to an adjacent tavern, where a more detailed account was given, for the express purpose of inserting it in the newspaper with which the reporter was connected; after which the reporter drew up an account of the matter, which was inserted in the paper; this was held sufficient proof of a publication by the defendant. But the newspaper was not admitted to be read in evidence, until the paper written by the reporter was produced, that it might appear that the written and the printed articles were the same.[3]

§ 173. The *publication* must be proved to have been made *within the county* where the trial is had.[4] If it was contained in a newspaper printed in another State, yet it will be sufficient to prove that it was circulated and read within the county.[5] If it was written in one county, and sent by post to a person in another, or its publication in another county be otherwise consented to, this is evidence of a publication in the latter county.[6] Whether,

[1] Rex *v.* Hall, 1 Stra. 416.

[2] 1 Hawk. P. C. ch. 73, § 10; 1 Russ. on Crimes, 250, 251. This rule is now modified in England, the defendant being permitted by Stat. 6 and 7 Vict. ch. 96, § 7, to prove that the publication was made without his authority, consent, or knowledge, and did not arise from his want of due care or caution.

[3] Adams *v.* Kelly, Ry. & M. 157. As to publication, see further, *ante*, Vol. 2, §§ 415, 416.

[4] 1 Russ. on Crimes, 258; Nicholson *v.* Lothrop, 3 Johns. 139.

[5] Commonwealth *v.* Blanding, 3 Pick. 304.

[6] 1 Russ. on Crimes, 258; 12 St. Tr. 331, 332; Rex *v.* Watson, 1 Campb. 215; Rex *v.* Johnson, 7 East, 65.

if a libel be written in one county, with intent to publish it in another, and it is accordingly so published, this is evidence sufficient to charge the party in the county in which it was written, is a question which has been much discussed, and at length settled in the affirmative.[1]

§ 174. The *colloquium* may be proved by witnesses, having knowledge of the parties and circumstances, who thereupon testified their belief that the libellous matter has the reference mentioned in the indictment; but it may also be proved by other circumstances, such as admissions by the defendant in other publications, &c.[2] It is not necessary to show that the libel would be understood by all persons to apply to the party alleged; it is sufficient if it were so understood by the witnesses themselves, who knew him. But they must understand it so from the libel itself; for if its application to the party injured be known or understood only by reference to other writings for which the defendant is not responsible, this will not be sufficient.[3]

§ 175. It is sometimes said that the *innuendoes*, also, must be proved; but this inaccuracy arises from not considering their precise nature and office. In an indictment for this offence, the *averment* states all the facts, *dehors* the writing, which are essential to the proper understanding of the libel itself; the *colloquium* asserts that the libel was written of and concerning the party injured, with reference to the matters so averred; the *innuendo* is merely explanatory of the subject-matter sufficiently expressed before, and of that only; and as it cannot extend the sense of the words beyond their own proper meaning, it is not the subject of proof.[4] Whether the libel relates to the matters so averred, is a question of fact for the Jury.[5]

§ 176. Whether, by the common law, the defendant, in an indictment for a defamatory libel on the person, could give the *truth in evidence*, in his justification, is a question which has been much debated in this country. By the common law as held in England, the truth of the libel was not a justification; but this has been recently modified by a statute, permitting the defendant, in an in-

[1] Rex *v.* Burdett, 4 B. & Ald. 95, per Abbott, C. J., and Best and Holroyd, Js., Bayley, J., *dubitante*.

[2] 2 Stark. on Slander, 51; Chubb *v.* Westley, 6 C. & P. 436. And see *ante*, Vol. 2, § 417. See Goodrich *v.* Davis, 11 Met. 473–485.

[3] Bourke *v.* Warren, 2 C. & P. 307.

[4] Commonwealth *v.* Snelling, 15 Pick. 335; Rex *v.* Horne, Cowp. 683, 684; Van Vechten *v.* Hopkins, 5 Johns. 211, 220–223. And see May *v.* Brown, 3 B. & C. 113.

[5] Ibid.

dictment or information for a defamatory libel, in addition to the plea of not guilty, to put in a special plea of the truth of the matters charged; upon which plea the truth may be inquired into; and if the Jury find the matter to be true, and that the publication thereof was for the public benefit, it constitutes a good defence to the prosecution.[1] In several of the United States this doctrine of the common law, though denied by some Judges, was recognized by the general current of judicial decisions, as of binding force in this country; but it has since been modified in some States, and totally abrogated in others, by constitutional or statutory provisions; so that it is no longer to be admitted as a rule of American law.[2] On the contrary, it will now be found, that, to an extent more or less limited, as will be shown, the truth of a defamatory publication brings it within the class of privileged communications.

§ 177. Thus, in some of the United States, it is enacted that the truth may be given in evidence, in all criminal prosecutions for libel. But this, it is conceived, is to be understood of libels defamatory of the person, and not to scandalous libels of a more general character. And the same construction should probably be given to all other enactments which permit the truth to be shown in prosecutions for this offence. In the statutes of some States, it is simply declared that the truth may, in those cases, be given in evidence;[3] in others, it is said that it shall be a justification;[4] but doubtless the effect of both expressions is the same. Again, it is provided in the *Constitutions* of several States, that the truth shall be admissible in evidence as a justification, in prosecutions for those publications which concern the official conduct of men in public office, or the qualifications of candidates for public office, or, more generally, where the matter is proper for public information;[5] other cases, it seems, being left at common law, except

[1] Stat. 6 & 7 Vict. ch. 96, § 6. See Cooke on Defamation, p. 467; and the Report of the Lords' Committee, with the evidence before them on the subject of libel, Id. pp. 471–512. The other English statutes in melioration and amendment of the law of libel may be found at large in the same work, App. No. 1, pp. 403–407.

[2] See Kent, Comm. 19–24.

[3] See *Connecticut*, Const. Art. 1, § 7; *New Jersey*, Rev. Stat. 1846, tit. 34, ch. 11, p. 964; *Missouri*, Const. Art. 13, § 16; *Mississippi*, Rev. Stat. 1840, ch. 49, § 24; How. & Hut. Dig. pp. 668, 669; *Georgia*, Prince's Dig. p 644; Cobb's Dig. Vol. 2, p. 812; *Texas*, Stat. Dec. 21, 1836, § 33, Hartley's Dig. Art. 2373, p. 724.

[4] See *Vermont*, Rev. Stat. 1839, ch. 25, § 68; *Maryland*, Stat 1803, ch. 54, Dorcey's ed. Vol. 1, p. 482; *North Carolina*, Rev. Stat. 1837, ch. 35, § 13; *Tennessee*, Stat. 1805, ch. 6, § 2, Car. & Nich. Dig. p. 439; *Arkansas*, Const. Art. 2, § 8; Rev. Stat. 1837, Div. 8, ch. 44, art. 2, § 3, p. 280. In *Illinois*, the truth is a justification in all cases, except in libels tending to blacken the memory of the *dead*, or to expose the *natural* defects of the living. Rev. Stat. 1845, Crim. Code, § 120.

[5] See *Ohio*, Const. Art. 8, § 6; *Indiana*,

where it may be otherwise provided by statute. And other States have provided, either in constitutional or statutory enactments, that the truth shall constitute a good defence, in all cases, provided it is found to have been published from good motives and for justifiable ends.[1] It thus appears, that in nearly all the United States, the right to give the truth in evidence, in criminal prosecutions for libels, is, to a greater or less extent, secured by express law; and probably would not now, in any of them, be denied. It may here be added, that by the Act of Congress of July 14, 1798, libels on the Government, or Congress, or the President, were made indictable in the courts of the United States, and the truth was permitted to be given in evidence, by the defendant, in his justification. This Act, though of limited duration, has been regarded as declaratory of the sense of Congress, that in prosecutions of that kind, it was a matter of common right for the defendant to show that the matter published was true.[2]

§ 178. In his *defence*, it is competent for the defendant to show that he did not participate in the publication; or, if it was done by his servant, that it was against his express orders, or out of the course of the servant's employment, or while the master was absent, under circumstances rendering it physically and morally impossible for him to prevent it; or that it was done by deceiving and defrauding the master. Or he may show, by other passages in the same book or newspaper relating to the matter, or referred to in the libel itself, that the libel was not defamatory, or criminal, in the sense imputed to it.[3] He may also show that the publica-

Const. Art. 1, § 10; *Alabama*, Const. Art. 6, § 14, Stat. 1807, Toulm. Dig. tit. 17, ch. 1, § 46; *Pennsylvania*, Const. Art. 9, § 7; *Kentucky*, Const. Art. 10, § 8; *Delaware*, Const. Art. 1, § 5; *Arkansas*, Const. Art. 2, § 8; *Maine*, Const. Art. 1, § 4; *Texas*, Const. 1845, Art. 1, § 6; *Illinois*, Const. Art. 8, § 23; *Tennessee*, Const. Art. 11, § 19.

[1] See *Massachusetts*, Rev. Stat. 1836, ch. 133, § 6; *New York*, Const. Art. 7, § 8; Rev. Stat. Vol. 1, p. 95, § 21; *Rhode Island*, Const. Art. 1, § 20; *Michigan*, Const. Art. 1, § 7; *Wisconsin*, Const. Art. 1, § 3; *Iowa*, Rev. Code, 1851, Art. 2769; *Florida*, Const. Art. 1, § 15, Thompson's Dig. p. 498, *California*, Const. Art. 1, § 9; Stat. 1850, ch. 99, § 120. In *Maine*, the truth will justify any publication respecting public men, or proper for public information, irrespective of the motive of publication; but to justify the publication of any other libel, it must be free from any corrupt or malicious motive. Rev. Stat. 1840, ch. 165, § 5. In *Illinois*, it is enacted, that "in all prosecutions for a libel, the truth thereof may be given in evidence in justification, except libels tending to blacken the memory of the dead, or expose the natural defects of the living." Rev. Stat. 1845, ch. 30, § 120. In *New Hampshire*, it is held as common law, that if there was a lawful occasion for the publication, and the matter published is true, the motive is immaterial; and that though the matter be not true, yet the publication may be excused, by showing that it was made on a lawful occasion, upon probable cause, and from good motives. The State *v.* Burnham, 9 N. Hamp. 34.

[2] See Laws U. States, Vol. 1, p. 596 (Peters's ed.), 2 Kent, Comm. 24.

[3] Rex *v.* Lambert, 2 Campb. 398.

tion was privileged, as being made in the course of his public or social duty.[1] But a subsequent publication of the same matter, when not required by such duty, as, for example, the printing of a speech delivered in a legislative assembly, or the like, is not privileged.[2] Whether the printer of legislative documents, containing official reports defamatory in their nature, could protect himself under the allegation of privilege, by showing that he published them by order of the legislature, is a question which at one time greatly agitated the British public; but at length it was settled that the order of the legislature was no defence to an action at law.[3]

§ 179. The *right of the Jury*, in criminal cases, and particularly in trials for libel, has also been the subject of much discussion. It was formerly held that where there were no circumstances which raised a question of justification in point of law, the Jury were bound to find the defendant guilty if they found the fact of publication and the truth of the *innuendoes;* these two matters of fact being all which they were permitted to inquire into.[4] In the United States, this doctrine is not known to have been received, but on the contrary it has been so distasteful as to have occasioned express constitutional and statutory provisions, to the effect that, in all such cases, the Jury may render a general verdict upon the whole matter under the issue of not guilty. The language of the constitutions of some States is, that "the Jury shall be judges of," and in other States, "shall have the right to determine," the law and the facts. In many of the constitutions it is provided that the Jury may do this "under the direction of the Court," [5] or, "after having received the direction of the Court," [6] "or, as in other cases";[7] but in other constitutions the provision is unqualified.[8]

[1] *Supra*, 167, 176; Goodnow *v.* Tappan, 1 Ohio, 60.

[2] Rex *v.* Creevey, 1 M. & S. 273, 278; Rex *v.* Ld. Abingdon, 1 Esp. R. 226; Oliver *v.* Ld. Bentinck, 3 Taunt. 456.

[3] Stockdale *v.* Hansard, 9 Ad. & El. 1.

[4] See Rex *v.* The Dean of St. Asaph, 3 T. R. 429–432, note, where the practice is historically stated and vindicated by Lord Mansfield. The excitement which grew out of this and some other cases, caused the passage of the statute of 32 Geo. 3, ch. 60, which *declares*, that in an indictment or information for a libel, upon the issue of not guilty, the Jurors may return a general verdict upon the whole matter, and not upon the fact of publication and the truth of the *innuendoes* alone.

[5] Such are the constitutional provisions in *Ohio*, Const. Art. 8, § 6; *Indiana*, Const. Art. 1, § 10; *Alabama*, Const. Art. 6, § 14; *Pennsylvania*, Const. Art. 9, § 7; *Kentucky*, Const. Art. 10, § 8; *Connecticut*, Const. Art. 1, § 7; *Missouri*, Const. Art. 13, § 16; *Illinois*, Const. Art. 8, § 23; *Tennessee*, Const. Art. 11, § 19.

[6] See *Maine*, Const. Art. 1, § 4; *Iowa*, Rev. Stats. 1851, § 2772.

[7] See *Delaware*, Const. Art. 1, § 5.

[8] See *Arkansas*, Const. Art. 2, § 8; *California*, Const. Art. 1, § 9; *New York*, Const. Art. 7, § 8; *Michigan*, Const. Art. 1, § 7; *Florida*, Const. Art. 1, § 15; *Wis-*

Upon these provisions a further question has been raised, whether the Jury were bound to follow the directions of the Court, in matters of law, or were at liberty to disregard them, and determine the law for themselves. On this point, the decisions are not entirely uniform; and some of them are not perfectly clear, from the want of discriminating between the *power* possessed by the Jury to find a general verdict, contrary to the direction of the Court in a matter of law, without being accountable for so doing, and their *right* so to do, without a violation of their oath and duty. But the weight of opinion is vastly against the right of the Jury, in any case, to disregard the law as stated to them by the Court; and, on the contrary, is in favor of their duty to be governed by such rules as the Court may declare to be the law of the land; the meaning of the constitutional provisions being merely this, that the Jury are the sole judges of all the facts involved in the issue, and of the application of the law to the particular case.[1]

*consin*, Const. Art. 1, § 3; *Texas*, Const. (1845), Art. 1, § 6. In this last-mentioned State, in the Constitution of 1836, Declaration of Rights, Art. 4, the words, "under the direction of the Court," were added; but in the revised Constitution of 1845, they were omitted.

[1] This question was very fully and ably considered in the United States *v.* Battiste, 2 Sumn. 243; The Commonwealth *v.* Porter, 10 Met. 263; Pierce *v.* The State, 13 N. Hamp. 536; The United States *v.* Morris, 4 Am. Law Journ. 241, N. S.; in which cases the other American and the English authorities are reviewed. And see *ante*, Vol. 1, § 49 [* and notes to present edition]; Townsend *v.* The State, 2 Blackf. 151; Warren *v.* The State, 4 Id. 150; Armstrong *v.* The State, Id. 247; Hardy *v.* The State, 7 Mis. 607; The People *v.* Pine, 2 Barb. (S. C.) R. 566. [* It has been considerably discussed in recent cases, how far corporations will be held responsible, as such, for the publication of libels by their directors or agents in the due course of the business of the corporation. It was held, in Whitfield *v.* South-Eastern Railway Company, 1 Ellis B. & Ellis, 115; S. C. 4 Jur. N. S. 688, that the company are responsible for the publication of a libel by the directors, in giving instructions by telegraph to their agents at the different stations, that the plaintiffs' bank "had stopped payment." So the corporation will be held responsible for circulating libellous matter in a report of its directors, with the accompanying evidence, even when made to the stockholders. Philadelphia, Wilmington & Baltimore Railway Co. *v.* Quigley, 21 How. U. S. 202.]

## MAINTENANCE.

[* § 180. Champerty and maintenance distinguished.
181. Allegations in indictment.
182 and 183. Defences.]

§ 180. This crime is said to consist in the unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hinderance of common right.[1] It is of two kinds, namely, *Ruralis*, or in the country, and *Curialis*, or in the courts. The former is usually termed *Champerty;* and is committed where one upholds a controversy, under a contract to have part of the property or subject in dispute. The latter alone is usually termed *Maintenance;* and is committed where one officiously, and without just cause, intermeddles in and promotes the prosecution or defence of a suit in which he has no interest, by assisting either party with money, or otherwise.[2] Both species of this crime are, in some form or other, forbidden by statutes, in nearly all the United States; but the common law is still conceived to be in force, where it has not been abrogated by the statute.[3]

§ 181. The indictment charges, in substance, that the defendant unjustly and unlawfully maintained and upheld a certain suit, pending in such a court (describing them), to the manifest hinderance and disturbance of justice. If the offence was strictly champerty, and consisted in the buying of a pretended or disputed title or claim to property from a grantor or vendor out of possession, the facts are specially stated in the indictment. In either

[1] 1 Hawk, P. C. ch. 83, § 1; 1 Inst. 368, b.; 2 Inst. 212.

[2] Ibid.; Thallhimer *v.* Brinckerhoff, 3 Cowen, 623; 20 Johns. 386; 1 Russ. on Crimes, p. 175; Holloway *v.* Lowe, 7 Port. 488.

[3] Wolcott *v.* Knight, 6 Mass. 421; Evereuden *v.* Beaumont, 7 Mass. 78; Swett *v.* Poor, 11 Mass. 553; Thurston *v.* Percival, 1 Pick. 416; Brinley *v.* Whiting, 5 Pick. 359; Key *v.* Vattier, 1 Ham. 132; Rust *v.* Larue, 4 Litt. 417; Brown *v.* Beauchamp, 5 Monroe, 416. In *Ohio*, and in *Illinois*, it has been held, that a conveyance by one who is disseised, is not void for champerty. Hall *v.* Ashby, 9 Ham. 96; Willis *v.* Watson, 4 Scam. 64. [In New York, the statutes contain all the law in force on the subject. Sedgwick *v.* Stanton, 4 Kern. 289.] [* The act of Henry VIII. is not rigidly enforced in this country. Wood *v.* McGuire, 21 Geo. 583. See Danforth *v.* Streeter, 28 Vt. 490.]

case, the charge, being properly made, is supported *primâ facie* by evidence of the specific facts alleged; as, that the defendant assisted another with money to carry on his cause; or did otherwise bear him out in the whole or part of the expense of the suit; or induced a third person to do so;[1] or, bargained to carry on a suit, in consideration of having part of the thing in dispute;[2] or purchased the interest of a party in a pending suit[3]; or the like.

§ 182. The defendant, in his *defence*, may avoid the charge, by evidence that the act was *justifiable;* as, that he already had an *interest* in the suit, in which he advanced his money, though it were but a contingent interest;[4] or, that he was nearly *related* by blood or marriage to the party whom he upheld, even though he were but a *step-son;*[5] or, was related socially, as a master or servant;[6] or, that he assisted the party because he was a poor man, and from motives of charity;[7] or, that the defendant was interested with others in the general *question* to be decided, and that they merely contributed to the expense of obtaining a judicial determination of that question.[8]

§ 183. If the defendant is charged with knowingly *buying or selling land in possession by another under an adverse claim of title*, with intent to disturb that possession, the charge may be resisted by evidence that such possession was not of a nature to throw any doubt upon the title; as, if it were under a mere quitclaim deed, from a naked possessor or occupant, who claimed no title;[9] or, that the adverse possession was of only a small proportion of the land, and that the entire agreement of sale was made in good faith, and not with the object of transferring a disputed title;[10] or,

[1] 1 Hawk. P. C. ch. 83, §§ 4, 5; 1 Russ. on Crimes, 175.

[2] Thallhimer *v.* Brinckerhoff, 3 Cowen, 623; Lathrop *v.* Amherst Bank, 9 Met. 489. [* A guaranty by an attorney of a claim left with him for collection is not champertous. Gregory *v.* Gleed, 33 Vt. 405. Nor the transfer by assignment to the attorney of the subject-matter of the suit, for the purpose of security for his charges, although it seems an absolute sale would be champertous. Anderson *v.* Radcliffe, 1 Ellis, B. & E. 806. That the agreement for the compensation of the plaintiff's attorney is champertous, is not a defence of which the defendant can avail himself. Robison *v.* Beall, 26 Geo. 17.]

[3] Arden *v.* Patterson, 5 Johns. Ch. 44.

[4] Thallhimer *v.* Brinckerhoff, 3 Cowen, 623; Williamson *v.* Henley, 6 Bing. 299; 1 Hawk. P. C. ch. 83, §§ 12–19; Wickham *v.* Conklin, 8 Johns. 220.

[5] Campbell *v.* Jones, 4 Wend. 306, 310. If he is heir apparent, it is sufficient, however remotely related. 1 Hawk, P. C. ch. 83, § 20.

[6] 1 Hawk. P. C. ch. 83, §§ 23, 24.

[7] Perine *v.* Dunn, 3 Johns. Ch. 508.

[8] Gowen *v.* Nowell, 1 Greenl. 292; Frost *v.* Paine, 12 Maine, 111.

[9] Jackson *v.* Hill, 5 Wend. 532; Jackson *v.* Collins, 3 Cowen, 89.

[10] Van Dyck *v.* Van Beuren, 1 Johns. 345; [Danforth *v.* Streeter, 2 Wms. (Vt.) 490.]

that the purchase was made for the purpose of confirming his own title ;[1] or the like. The party selling is presumed to know of the existence of an adverse possession, if there be any ;[2] but this may be rebutted by counter evidence on the part of the defendant.[3]

[1] Wilcox *v.* Calloway, 1 Wash. 38. [* A devise or conveyance between near relations, of land held adversely or in litigation is good and not champertous. Morris *v.* Henderson, 37 Miss. 492. The policy prohibiting the sale of lands in the adverse possession of another, is not applicable to judicial and official sales. Hanna *v.* Renfro, 32 Miss. 125. Cook *v.* Travis, 20 N. Y. 400.]

[2] Hassenfrats *v.* Kelly, 13 Johns. 466; Lane *v.* Shears, 1 Wend. 433; Etheridge *v.* Cromwell, 8 Wend. 629.

[3] Ibid. And see Jackson *v.* Demont, 9 Johns. 55; Swett *v.* Poor, 11 Mass. 549, 554.

# NUISANCE.

[* § 184. Various acts constituting common nuisance.
185. Indictment alleges fact to be to the common nuisance of all citizens of the State.
186. Act of defendant, and that it was to the common injury of the public must be proved.
187. Defences. Cannot be shown that act causes public benefit equal to inconvenience.]

§ 184. Common Nuisances are a species of offence against the public order and economical regimen of the State; being either the doing of a thing to the annoyance of all the citizens, or the neglecting to do a thing which the common good requires.[1] More particularly it is said to comprehend endangering the public personal safety or health; or doing, causing, occasioning, promoting, maintaining, or continuing what is noisome and offensive, or annoying and vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty, and good habits of the people; the same being without authority or justification by law.[2] Hence, it is indictable, as a common nuisance, to carry on an offensive trade or manufacture in a settled neighborhood or place of usual public resort or travel, whether the offence be to the sight, or smell, or hearing;[3] or, to expose the citizens to a contagious disease, by carrying an infected person through a frequented street, or opening a hospital in an improper place;[4] or, to make or keep gunpowder in or near a frequented

[1] 1 Hawk. P. C. ch. 75, § 1; 4 Bl. Comm. 166; 1 Russ. on Crimes, 318. [* What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree, dependent on varying circumstances, cannot be precisely defined. Columbus Gas, &c. Co. *v.* Freeland, 12 Ohio (N. S.), 392.]

[2] Report of Massachusetts Commissioners on Crim. Law, tit. Common Nuisance, § 1. [* Profane cursing and swearing in public is indictable as a common nuisance. State *v.* Graham, 3 Sneed (Tenn.), 134.]

[3] Rex *v.* Pappineau, 1 Stra. 686; Rex *v.* Neville, 1 Peake, 91; The People *v.* Cunningham, 1 Denio, 524. [* And the smell need not be injurious to health, but only offensive to the senses. State *v.* Wetherall, 5 Harring. 487. Where a railroad authorized by its charter to be made at one place, is made at another, it is a mere nuisance on every highway it touches in its illegal course. Commonwealth *v.* Erie & North East R. R. Co., 27 Penn. St. 339.]

[4] Rex *v.* Vantandillo, 4 M. & S. 73; Rex *v.* Burnett, 4 M. & S. 272; Anon. 3 Atk. 750.

place, without authority therefor;[1] or, to make great noises in the night, by a trumpet, or the like, to the disturbance of the neighborhood;[2] or, to keep a disorderly house;[3] or, a house of ill-fame;[4] or, indecently to expose the person;[5] or, to be guilty of open lewdness and lascivious behavior;[6] or, to be frequently and publicly drunk, and in that state exposed to the public view;[7] or, to be a common scold;[8] or, a common eavesdropper;[9] or, to obstruct a public highway.[10] Many of these, and some others, which are also offences by the common law, are forbidden by particular statutes, upon which the prosecutions are ordinarily founded.[11]

§ 185. The indictment for this offence states the facts which form the subject of the charge, alleging it to be to the common nuisance of all the citizens of the State or Commonwealth.[12] But if the subject be one which in its nature necessarily tends to the injury of all the citizens, such as obstructing a river described as a public navigable river, or a way described as a public highway, or the like, it is said to be sufficient, without any more particular allegation of common nuisance.[13]

[1] Rex *v.* Taylor, 2 Stra. 1167; The People *v.* Sands, 1 Johns. 78. [See also Regina *v.* Lister, 1 Dears. & B. 209, where it was held a nuisance to keep a large quantity of naphtha, a highly inflammable substance, stored in large quantities, in a thickly populated neighborhood.]

[2] Rex *v.* Smith, 1 Stra. 704; Commonwealth *v.* Smith, 6 Cush. 80.

[3] Rex *v.* Higginson, 2 Burr. 1232; 13 Pick. 362; The State *v.* Bertheok, 6 Blackf. 474; The State *v.* Bailey, 1 Foster (N. H.), 343.

[4] 1 Hawk. P. C. ch. 74; Id. ch. 75, § 6.

[5] Rex *v.* Sedley, 1 Keb. 630; Sid. 168; Rex *v.* Crunden, 2 Campb. 89; The State *v.* Roper, 1 Dev. & Bat. 208. An indecent exposure, though in a place of public resort, if visible only by one person, no other person being in a position to see it, is not indictable as a common nuisance. Regina *v.* Webb, 3 Cox, C. C. 338; 1 Leading Crim. Cases, 442; 1 Denison, C. C. 328; 2 C. & K. 933; Temp. & Mew. C. C. 23; Regina *v.* Watson, 2 Cox, C. C. 376; 1 Leading Crim. Cases, 445, note. [* But it is not necessary that the exposure should be made in a place open to the public. If the act is done where a great number of persons may see it and several do see it, it is sufficient. Reg *v.* Thallman, 9 Cox, C. C. 388.] An indictment for this offence need not conclude to the common nuisance. Commonwealth *v.* Haynes, 2 Gray, 72. But see Regina *v.* Webb, *ubi supra;* Regina *v.* Holmes, 17 Jur. 562; 1 Leading Crim. Cases, 452; 3 C. & K. 360; 6 Cox, C. C. 216; 20 Eng. Law & Eq. R. 597.

[6] 1 Hawk. P. C. ch. 5, § 4; 1 Russ. on Crimes, 326; Grisham *v.* The State, 2 Yerg. 589; The State *v.* Moore, 1 Swan, 136.

[7] Smith *v.* The State, 1 Humph. 396; The State *v.* Waller, 3 Murph. 229. See Commonwealth *v.* Boon, 2 Gray, 74.

[8] 1 Hawk. P. C. ch. 75, §§ 5, 14; 4 Bl. Comm. 168; 1 Russ on Crimes, 327.

[9] 4 Bl. Comm. 168; 1 Russ. on Crimes, 327.

[10] 4 Bl. Comm. 167; 1 Hawk. P. C. ch. 76.

[11] See, for the Law of Common Nuisances, Whart. Am. Crim. Law, pp. 698–706, and cases there cited.

[12] The indictment should conclude to the *common* nuisance of *all* the citizens, etc. Commonwealth *v.* Faris, 5 Rand. 691; Commonwealth *v.* Smith, 6 Cush. 80; Hayward's case, Cro. El. 148; Commonwealth *v.* Boon, 2 Gray, 74, 75; Graffins *v.* The Commonwealth, 3 Penn. 502; Dunnaway *v.* The State, 9 Yerg. 350. But see Commonwealth *v.* Haynes, 2 Gray, 72.

[13] 1 Hawk. P. C. ch. 75, §§ 3, 4, 5; 1 Russ. on Crimes, 329.

§ 186. In *proof of the charge*, evidence must be adduced to show, 1st, that the act complained of was done by the defendant; and this will suffice, though he acted as the agent or servant and by the command of another;[1] 2d, that it was to the common injury of the public, and not a matter of mere private grievance. And this must be shown as an existing fact, and not by evidence of reputation.[2] If the act done or neglected is charged as a common nuisance on the ground that it is offensive, annoying, or prejudicial to the citizens, it must be shown to be actually and substantially so; for groundless apprehension is not sufficient; and mere fear, though reasonable, has been said not to create a nuisance;[3] neither is slight, uncertain, and rare damage.[4]

§ 187. In the *defence*, it is of course competent to give evidence of any facts tending to disprove or to justify the charge.[5] But the defendant will not be permitted to show that the public benefit resulting from his act, is equal to the public inconvenience which arises from it; for this would be permitting a private person to take away a public right, at his discretion, by making a specific compensation.[6] But it seems that such evidence may be admitted to the Court, in mitigation of a discretionary fine or penalty.[7] If the charge is for obstructing a public river, by per-

[1] The State *v.* Bell, 5 Port. 365; The State *v.* Mathis, 1 Hill (S. C.), 37; [Commonwealth *v.* Manu, 4 Gray, 213.]

[2] Commonwealth *v.* Stewart, 1 S. & R. 342; Commonwealth *v.* Hopkins, 2 Dana, 418.

[3] Anon. 3 Atk. 751, per Ld. Hardwicke. And see 1 Russ. on Crimes, 318; Report Mass. Comm. tit. Common Nuisance, § 2; Rex *v.* White, 1 Burr. 333. [* Under a statute making a house used for prostitution, gambling, or the sale of intoxicating liquors a common nuisance, proof that the nuisance was kept and maintained for two hours, is sufficient to support the indictment. Commonwealth *v.* Gallagher, 1 Allen, 592.]

[4] Rex *v.* Tindall, 6 Ad. & El. 143; 1 Nev. & Per. 719. See Regina *v.* Charlesworth, 16 Q. B. 1012; 22 Eng. Law & Eq. R. 235.

[5] [But no length of time will justify a public nuisance. 1 Russ. on Crimes (7th Am. ed.), 330; Mills *v.* Hall, 9 Wend. 315; The People *v.* Cunningham, 1 Den. 536; [* But *quære*, House *v.* Metcalf, 27 Conn. 631.] And it is no defence to an indictment for carrying on a noxious trade, that it had been carried on for more than twenty years, before the neighborhood became so inhabited and used by the public as to make it a common nuisance. Commonwealth *v.* Upton, 6 Gray, 472. And see Douglass *v.* State, 4 Wis. 387.] [* State *v.* Phipps, 4 Ind. 515. A structure authorized by the legislature cannot be a public nuisance. People *v.* Law, 34 Barb. N. Y. 494. See also, Commonwealth *v.* Reed, 34 Penn. St. R. 275. Stoughton *v.* State, 5 Wis. 291. Griffing *v.* Gibb, 1 McAll. C. C. (Cal.) 212. In State *v.* Freeport, 43 Maine, 198, it is held that if a bridge, built under due authority, across a navigable river, obstruct navigation more than is reasonably necessary, it is a nuisance and the subject of indictment.]

[6] Rex *v.* Ward, 4 Ad. & El. 384; overruling Rex *v.* Russell, 6 B. & C 566; 9 Dowl. & Ryl. 566, in which the contrary had been held. And see acc. Respublica *v.* Caldwell, 1 Dall. 150. See also Regina *v.* Randall, Car. & M. 496; Rex *v.* Morris, 1 B. & Ad. 441; Regina *v.* Betts, 16 Q. B. 1022; 22 Eng. Law & Eq. R. 240; Regina *v.* Sheffield Gas Co. Id. 200. [* Redfield on Railways, Vol. 2, §§ 225 and 226.]

[7] The State *v.* Bell, 5 Port. 365.

mitting his sunken ship to remain there, the defendant may show that the ship was wrecked and sunken without his fault;[1] and the same principle, it is conceived, will apply to any other case or accidental obstruction. The navigable or public character of the river or highway may also be controverted by evidence.[2]

[1] Rex *v.* Watts, 2 Esp. R. 675. *Quære*, whether it is not requisite for the defendant, in such cases, to show that he has relinquished and abandoned all claim or right of property in the wreck. And see Brown *v.* Mallett, 5 C. B. 599, 617 – 620.

[2] Commonwealth *v.* Chapin, 5 Pick. 199. [* It *seems* that nothing can be a "nuisance" to which the agency of man does not contribute, for example, a bar in a stream formed by natural causes seems to be no nuisance. Mohr *v.* Gault, 10 Wis. 513. When a public nuisance has become the subject of judicial investigation, the power of a private citizen to remove it is gone. Commonwealth *v.* Erie & Northeast R. R. Co. 27 Penn. St. 379.]

# PERJURY.

[* § 188. Generally subject of statute provisions. Subornation of perjury punishable at common law.
189. Requisites of indictment.
190. Character of proceedings in which perjury may be committed.
191. Competency of witness not important.
192. Proof of the oath taken.
193. Proof of the substance of one assignment sufficient.
194. Oral testimony of prisoner need not be proved *ipsissimis verbis*.
195. Must have been material, but degree of materiality not important.
196. Materiality determined by reference to the time when testimony was given.
197. Materiality, how proved.
198. Wilful falsity need not be proved by two witnesses.
199. Circumstances showing wilful falsehood.
200. Swearing rashly to a matter which witness never saw nor knew, perjury.
201. Want of jurisdiction in court or magistrate before whom testimony is given, or mistake, or immateriality of evidence, defence.
202. Prosecutor now put in same position as any other witness.]

§ 188. This crime is the subject of statute provisions, to a greater or less extent, in all the United States; and in some statutes it is particularly defined; but cases, not provided for by statute, are understood to remain offences at common law. The crime, as *described in the common law*, is committed when a *lawful oath* is administered, in some *judicial proceedings* or *due course of justice*, to a person who *swears wilfully, absolutely and falsely*, in a *matter material* to the issue or point in question.[1] Where the crime is committed at the instigation or procurement of another, it is termed *subornation of perjury*, in the party instigating it; and is equally punishable by the common law.[2] And though the person thus instigated to take a false oath, does not take it, yet the instigator is still liable to punishment.[3]

§ 189. The *indictment* for perjury will of course specify all the

[1] 3 Inst. 164; 4 Bl. Comm. 137; 1 Hawk. P. C. ch. 69, § 1; 2 Russ. on Crimes, 596; Whart. Am. Crim. Law, 650.

[2] Commonwealth *v.* Douglass, 5 Met. 241.

[3] 1 Hawk. P. C. ch. 69, § 10. Though a party, who is charged with subornation of perjury, know that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted. Commonwealth *v.* Douglass, 5 Met. 241.

facts essential to this offence; namely, 1st, the *judicial proceedings* or *due course of justice*, in which the oath was taken; 2dly, the *oath*, lawfully taken by the prisoner; 3dly, the *testimony*, which he gave; 4thly, its *materiality* to the issue or point in hand; and, 5thly, its *wilful falsehood*.

§ 190. In regard to the *character of the proceeding* in which the oath is taken, it may be stated, as the general principle, that wherever an oath is required in the regular administration of justice, or of civil government under the general laws of the land, the crime of perjury may be committed. It has therefore been held sufficient, if it be proved that the crime was committed by the prisoner, in his testimony orally as a witness in open Court, or in an information or complaint to a magistrate, or before a commissioner or a magistrate, in his deposition; or before a State magistrate, under an act of Congress;[1] in any lawful Court whatever, whether of Common Law, or Equity;[2] or Court Ecclesiastical;[3] of record, or not of record;[4] and whether it be in the principal matter in issue, or in some incidental or collateral proceeding, such as before the Grand Jury, or in justifying bail,[5] or the like; and whether it be as a witness, or as a party, in his own case, where his testimony or affidavit may lawfully be given.[6] And where, upon qualification for any office or civil employment, of honor, trust, or profit, an oath is required of the person, stating some matter of fact, a wilful and corrupt false statement in such matter, is perjury.[7] It is sufficient, if it appear *primâ facie*, that the Court had jurisdiction of the matter, and that the Judge, Magistrate, or Officer, before whom the oath was taken was, *de facto*, in the ordinary exercise of the office;[8] such evidence on the part of the prosecution,

[1] 1 Hawk. P. C. ch. 69, § 3; 2 Chitty, Crim. Law, 443, 445; Regina *v.* Gardner, 8 C. & P. 737; Carpenter *v.* The State, 4 How. (Miss. R.), 163; United States *v.* Bailey, 9 Peters, 238. [Whether perjury in a naturalization proceeding before a State magistrate is punishable in the State Courts, *quære*. See The People *v.* Sweetman, 3 Parker, C. R. 358; Rump *v.* Commonwealth, 30 Penn. 475.]

[2] Ibid.; 5 Mod. 348; Crew *v.* Vernon, Cro. Car. 97, 99; Poultney *v.* Wilkinson, Cro. El. 907.

[3] Shaw *v.* Thompson, Cro. El. 609; 1 Hawk. P. C. ch. 69, § 3.

[4] 2 Roll. Abr. 257, Perjury, pl. 2; 1 Hawk. *ub. supra*; 5 Mod. 348; The People *v.* Phelps, 5 Wend. 10.

[5] Regina *v.* Hughes, 1 C. & K. 519; 1 Roll. Abr. 39, 40; Royson's case, Cro. Car. 146; Commonwealth *v.* White, 8 Pick. 455; The State *v.* Offutt, 4 Blackf. 355; The State *v.* Fassett, 16 Conn. 457; The State *v.* Moffatt, 7 Humph. 250.

[6] 1 Hawk. P. C. ch. 69, § 5; Respublica *v.* Newell, 3 Yeates, 407; The State *v.* Steele, 1 Yerg. 394; The State *v.* Johnson, 7 Blackf. 49.

[7] Rex *v.* Lewis, 1 Stra. 70; Report Comm'rs Mass. on Crim. Law, tit. Perjury, § 13. The State *v.* Wall, 9 Yerg. 347, was the case of a Juror, examined as to his competency.

[8] See *ante*, Vol. 1, §§ 83, 92; The State *v.* Hascall, 6 N. Hamp. 352; The State *v.* Gregory, 2 Murphy, 69; Rex *v.* Verelst, 3 Campb. 432; Rex *v.* Howard, 1 M. & Rob. 187.

devolving on the prisoner the burden of showing the contrary. But this rule is applicable only to public functionaries; and, therefore, where the authority to administer the oath was derived from a special commission for that purpose, as in the case of a commission out of Chancery, to take testimony in a particular cause, or where it is delegated to be exercised only under particular circumstances, as in the case of commissioners in bankruptcy, whose power depends on the fact that an act of bankruptcy has been committed, or the like; the commission, in the one case, or the existence of the essential circumstances, in the other, must be distinctly proved.[1]

§ 191. The *competency of the witness* to testify, or the fact that he was not *bound to answer* the question propounded to him, or the erroneousness of the judgment founded upon his testimony, are of no importance; it is sufficient, if it be shown that he was admitted as a witness, and did testify.[2] But if he were improperly admitted as a witness, in order to give jurisdiction to the Court, it being a Court of special and limited jurisdiction, his false swearing is not perjury.[3]

§ 192. 2dly. In *proof of the oath taken*, under the usual allegation that "he was sworn and examined as a witness," or, "sworn and took his corporal oath," it will be sufficient to give evidence that it was in fact taken in some one of the modes usually practised.[4] But if it be alleged that it was taken on the gospels, and the proof be that it was taken with an uplifted hand, the variance will be fatal; for the mode in such case is made essentially descriptive of the oath.[5] So, it is conceived, it would be, if the allegation were that the party was sworn, and the proof were of a solemn affirmation; or the contrary. Nor is it a valid objection, that the oath was irregularly taken; as, for example, where the witness was sworn to testify the whole truth, when he should have been sworn only to make true answers.[6] Where the oath was made to an answer in Chancery, deposition, affidavit, or other

[1] Rex *v.* Punshon, 3 Campb. 96. [* Semble, that taking a false oath before a court-martial is perjury at common law. Reg. *v.* Heane, 4 B. & S. 947.]

[2] Montgomery *v.* The State, 10 Ohio, 220; Haley *v.* McPherson, 3 Humph. 104; Sharp *v.* Wilhite, 2 Humph. 434; 1 Sid. 274; Shaffer *v.* Kintner, 1 Binn. 542; Rex *v.* Dummer, 1 Salk. 374; Van Steenbergh *v.* Kortz, 10 Johns. 167; The State *v.* Molier, 1 Dev. 263.

[3] Smith *v.* Bouchier, 2 Stra. 993; 10 Johns. 167.

[4] Rex *v.* Rowley, Ry. & M. 302; 2 Chitty, Crim. Law, 309; Rex *v.* McCarther, 1 Peake's Cas. 155; The State *v.* Norris, 9 N. Hamp. 96.

[5] See *ante*, Vol. 1, § 65; The State *v.* Porter, 2 Hill (S. Car.), 611. And see The State *v.* Norris, 9 N. Hamp. 96; Rex *v.* McCarther, 1 Peake's Cas. 155.

[6] The State *v.* Keene, 26 Maine, 33.

*written paper*, signed by the party, the original document should be produced, with proof of his handwriting, and of that of the magistrate before whom it was sworn; which will be sufficient evidence of the oath to throw on the prisoner the burden of proving that he was personated on that occasion by a stranger.[1] If the affidavit were actually used by the prisoner in the cause in which it was taken, proof of this fact will supersede the necessity of proving his handwriting.[2] The rule in these cases seems to be this: that the proof must be sufficient to exclude the hypothesis that the oath was taken by any other person than the prisoner.[3] If the document appears to have been signed by the prisoner with his name, it will be presumed that he was not illiterate, and that he was acquainted with its contents; but if he made his *mark* only, he will be presumed illiterate; in which case some evidence must be offered to show that it was read to him; and for this purpose the certificate of the magistrate or officer, in the *jurat*, will be sufficient.[4] It must also appear that the oath was taken in the *county* where the indictment was found and is tried; but the *jurat*, though *primâ facie* evidence of the place, is not conclusive, and may be contradicted.[5]

§ 193. 3dly. As *to the testimony actually given.* If there are several distinct assignments of perjury upon the same testimony in one indictment, it will be sufficient if any one of them be proved;[6] and proof of the substance is sufficient, provided it is in substance and effect the whole of what is contained in the assignment in question.[7] Whether it is necessary to prove all the testimony which the prisoner gave at the time specified, is a point which has been much discussed, the affirmative being understood

[1] Rex *v.* Morris, 2 Burr. 1189; Rex *v.* Benson, 2 Camph. 508; Crook *v.* Dowling, 3 Doug. 75; Ewer *v.* Ambrose, 4 B. & C. 25; Commonwealth *v.* Warden, 11 Met. 406; *Ante*, Vol. 1, § 512. Where perjury was assigned upon an answer in Chancery, to a bill filled by A. "against B. *and another*," and it appeared that in fact the bill was against B. and *several others;* Lord Ellenborough held it nevertheless sufficient, and no variance in the proof upon the statute of 23 Geo. 2, ch. 11, § 1, which only required that such proceedings be set out according to their substance and effect. Rex *v.* Benson, *supra.* The rule, it is conceived, is the same at common law.

[2] Rex *v.* James, 1 Show. 397; Carth. 220, S. C. It was *Carthew's* report of this case, which was denied by Lord Mansfield, in Crook *v.* Dowling, *supra;* it not appearing that the affidavit, of which a copy only was offered, had been *used* by the prisoner. And see Rees *v.* Bowen, McCl. & Y. 383.

[3] Rex *v.* Brady, 1 Leach, C. C. (4th ed.) 327; Rex *v.* Price, 6 East, 323.

[4] Rex *v.* Hailey, 1 C. & P. 258.

[5] Rex *v.* Taylor, Skin. 403; Rex *v.* Emden, 9 East, 437; Rex *v.* Spencer, 1 C. & P. 260. [An omission in an indictment, even by mistake of the verb, implying that the prisoner testified, is fatal. State *v.* Leach, 27 Verm. 317.]

[6] The State *v.* Hascall, 6 N. Hamp. 352; [Commonwealth *v.* Johns, 6 Gray, 274.]

[7] Rex *v.* Leefe, 2 Campb. 134.

to have been ruled several times by Lord Kenyon ;[1] but it will be found, on examination of the cases, that he could have meant no more than that the prosecutor ought to prove all that the prisoner testified respecting the fact on which the perjury was assigned.[2] It is, however, conceived, that to require the prosecutor to make out a *primâ facie* case, leaving the prisoner to show that in another part of his testimony he corrected that part on which the perjury is assigned, is more consonant with the regular course of proceeding in other cases, where matters, in excuse or explanation of an act *primâ facie* criminal, are required to be shown by the party charged.[3]

§ 194. In proving what the prisoner orally testified, it is not necessary that it be proved *ipsissimis verbis;* nor that the witness took any note of his testimony; it being deemed sufficient to prove substantially what he said, and all that he said on the point in hand.[4] Neither is it necessary to a conviction of perjury, to prove that the testimony was given in an absolute and direct form of statement; but, under proper averments, it will be sufficient to prove that the prisoner swore falsely as to his impression, best recollection, or best knowledge and belief.[5] In such case, however, it will be not only necessary to prove that what he swore was untrue, but also to allege and prove that he knew it to be false ;[6] or, at least, that he swore rashly to a matter which he had no probable cause for believing.[7]

§ 195. 4thly. As to the *materiality* of the matter to which the prisoner testified, it must appear either to have been directly pertinent to the issue or point in question, or tending to increase or diminish the damages, or to induce the Jury or Judge to give readier credit to the substantial part of the evidence.[8] But the *degree* of materiality is of no importance; for if it tends to prove

[1] Rex *v.* Jones, 1 Peake's Cas. 37; Rex *v.* Dowlin, Id. 170.

[2] See acc. Rex *v.* Rowley, Ry. & M. 299; where it was ruled by Littledale, J., and afterwards confirmed by all the Judges.

[3] See 2 Russ. on Crimes, 658; 2 Chitty, Crim. Law, 312 *b; Ante,* Vol. 1, § 79; Rex *v.* Carr, 1 Sid. 418.

[4] Rex *v.* Munton, 3 C. & P. 498; 2 Russ. on Crimes, 658.

[5] Miller's case, 3 Wils. 420, 427; Patrick *v.* Smoke, 3 Strobh. 147; Rex *v.* Pedley, 1 Leach, C. C. (4th ed.) 325; 2 Chitty, Crim. Law, 312; 2 Russ. on Crimes, 597; Regina *v.* Schlesinger, 10 Q. B. 670; 2 Cox, C. C. 200.

[6] Regina *v.* Parker, Car. & M. 639; 2 Chitty, Crim. Law, 312, 320.

[7] Commonwealth *v.* Cornish, 6 Binn. 249.

[8] 2 Russ. on Crimes, 600; 1 Hawk. P. C. ch. 69, § 8; Rex *v.* Aylett, 1 T. R. 63, 69; Commonwealth *v.* Parker, 2 Cush. 212; Commonwealth *v.* Knight, 12 Mass. 273; Rex *v.* Prendergast, Jebb, C. C. 64. In a late case, Erle, J., said, he thought the law *ought* to be, that *whatever* is sworn deliberately, and in open Court, should be the subject of perjury; though the law, as

the matter in hand, it is enough, though it be but circumstantial.[1] Thus, falsehood, in the statement of collateral matters, not of substance, such as the day in an action of trespass, or the kind of staff with which an assault was made, or the color of his clothes, or the like, may or may not be criminal, according as they may tend to give weight and force to other and material circumstances, or to give additional credit to the testimony of the witness himself or of some other witness in the cause.[2] And therefore every question upon the cross-examination of a witness, is said to be material.[3] In the answer to a bill in equity, matters not responsive to the bill may be material.[4] But where the bill prays discovery of a parol agreement, which is void by the statute of frauds, and which is denied in the answer, this distinction has been taken; that where the statute is pleaded or expressly claimed as a bar, the denial of the fact is immaterial and therefore no perjury; but that where the statute is not set up, but the agreement is incidentally charged, as, for example, in a bill for relief, the fact is material, and perjury may be assigned upon the denial.[5]

§ 196. As it is the act of false swearing that constitutes the crime, and not the injury which it may have done to individuals, the materiality of the testimony is to be ascertained by reference to *the time when it was given*, the perjury being then, if ever committed. If, therefore, an affidavit was duly sworn, but cannot be read, by reason of some irregularity in the *jurat*, or for some other

it exists, he added, is undoubtedly different. Regina *v.* Philpotts, 5 Cox, C. C. 336.

[1] Rex *v.* Griepe, 1 Ld. Raym. 258; Rex *v.* Rhodes, 2 Ld. Raym. 889, 890; The State *v.* Hathaway, 2 N. & McC. 118; Commonwealth *v.* Pollard, 12 Met. 225. See Regina *v.* Worley, 6 Cox, C. C. 535; Regina *v.* Owen, 6 Cox, C. C. 105.

[2] 1 Hawk. P. C. ch. 69, § 8; 2 Russ. on Crimes, 600; Rex *v.* Styles, Hetley, 97; Studdard *v.* Linville, 3 Hawks, 474; The State *v.* Norris, 9 N. Hamp. 96. False evidence, whereby, on the trial of a cause, the Judge is induced to admit other material evidence, is indictable as perjury, even though the latter evidence be afterwards withdrawn by counsel. Regina *v.* Philpotts, 3 C. & K. 135; 5 Cox, C. C. 329; 2 Denison, C. C. 302; 8 Eng. Law & Eq. R. 580. [* It is not a sufficiently precise allegation upon which to found an indictment for perjury, that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. Reg. *v.* Stolady, 1 F. & F. 518.]

[3] The State *v.* Strat, 1 Murphey, 124; Regina *v.* Overton, 2 Moody, C. C. 263; Car. & Marsh. 655; Regina *v.* Lavey, 3 C. & K. 26.

[4] 5 Mod. 348.

[5] Regina *v.* Yeates, Car. & Marsh. 132; Rex *v.* Beneseek, 2 Peake's Cas. 93; Rex *v.* Dunston, Ry. & M. 109. See Commonwealth *v.* Parker, 2 Cush. 225. The *facts* being proved, the question, whether they are material or not, is a question of *law*. Steinman v. McWilliams, 6 Barr. 170. [It seems that the materiality of the matter assigned is a question for the Jury. Regina *v.* Lavey, 3 C. & K. 26. And when a party is indicted for perjury in giving testimony on the trial of an issue in Court, proof that his testimony was admitted on that trial is not sufficient to warrant a Jury, on the trial of the indictment, to infer that such testimony was

cause is not used;[1] or if after the testimony was given, some amendment of the issue, or other change in the proceedings, takes place, by means of which the testimony, which was material when it was given, has become immaterial;[2] proof of its materiality at the time is still sufficient to support this part of the charge. Nor is it necessary to show that *any credit was given* to the testimony; it is enough to prove that it was in fact given by the prisoner.[3]

§ 197. Where the proof of materiality is found in the records of the Court, or in the documents necessary to show the nature of the proceedings in which the oath was taken, this fact will appear in the course of proving the proceedings, as has already been shown. But where the perjury is assigned in the evidence given in the cause, it will be necessary, not only to produce the record, but to give evidence of so much of the state of the cause, and its precise posture at the time of the prisoner's testifying, as will show the materiality of his testimony. The indictment does not necessarily state how it became material, but only charges, generally, that it was so.[4]

§ 198. 5thly. As to the *wilful falsity* of the matter testified. It was formerly held, that *two witnesses* were indispensable, in order to a conviction for perjury; as otherwise there would be only oath against oath; but this rule has been with good reason relaxed; and a conviction, as has been fully shown in a preceding volume, may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned. This point having been fully treated in the place referred to, it is superfluous here to pursue it further.[5] It may, however, be added here, that it is only in proof of the *falsity* of what was testified,

material to the issue. Commonwealth *v.* Pollard, 12 Met. 225.] [* See Reg. *v.* Goddard, 2 F. & F. 361.]

[1] Regina *v.* Hailey, 1 C. & P. 258; Rex *v.* Crossley, 7 T. R. 315. And see The State *v.* Lavalley, 9 Miss. 834.

[2] Bullock *v.* Koon, 4 Wend. 531.

[3] 1 Hawk. P. C. ch. 69, § 9; 2 Russ. on Crimes, 603.

[4] The State *v.* Mumford, 1 Dev. 519.

[5] *Ante*, Vol. 1, §§ 257–260. [* Reg. *v.* Braithwaite, 8 Cox, C. C. 254.] Commonwealth *v.* Parker, 2 Cush. 212; The United States *v.* Wood, 14 Peters, 430; 1 Leading Crim. Cases, 482; Regina *v.* Boulter, 3 C. & K. 236; 5 Cox, C. C. 543; 1 Leading Crim. Cases, 494; 16 Jur. 135; 2 Russ. on Crimes, 649–654. And see Regina *v.* Wheatland, 8 C. & P. 238; Regina *v.* Champney, 2 Lewin, C. C. 258; Regina *v.* Hughes, 1 C. & K. 519. It is also to be noted, that declarations *in articulo mortis* are not admissible, even as corroborative or adminicular evidence, except in cases of homicide. See *ante*, Vol. 1, § 156. [* It is not necessary that the evidence adduced to corroborate the first witness to an assignment of perjury, should amount to a direct contradiction of the statement made by the prisoner, upon which the perjury is assigned. Reg. *v.* Towey, 8 Cox, C. C. 328. Memorandum made by witness, at date of transaction sufficient corroboration of witness. Reg. *v.* Webster, 1 F. & F. 515.]

that more evidence than that of a single witness is required; one witness alone being sufficient to prove all the other allegations in the indictment.[1]

§ 199. In proof that the testimony was wilfully false, evidence may be given, showing animosity and malice in the defendant against the prosecutor;[2] or, that he had sinister and corrupt motives in the testimony which was falsely given. Thus, where perjury was assigned upon a complaint made by the defendant of threats on the part of the prosecutor to do him some great bodily harm, thereupon requiring sureties of the peace against him; evidence was held admissible, showing that the real object of the defendant, in making that complaint, was to coerce the prosecutor to pay a disputed demand.[3] And if the false testimony given in a cause were afterwards retracted, in a cross-examination, or a subsequent stage of the trial; yet the indictment will be supported by proof that the false testimony was wilfully and corruptly given, notwithstanding the subsequent retraction.[4] But it must be clearly shown to have been wilfully and corruptly given, without any intention, at the time, to retract it; for it is settled, that a general answer may be subsequently explained, so as to avoid the imputation of perjury. Thus, where perjury was assigned upon an answer in Chancery, in which the defendant stated that she had received no money; and it was proved, that, upon exceptions being taken to this answer, she had put in a second answer, explaining the generality of the first, and stating that she had received no money before such a day; it was held, upon a trial at bar, that nothing in the first answer could be assigned as perjury, which was explained in the second.[5]

§ 200. The allegation that the oath was *wilfully and corruptly false*, may also be supported by evidence, that the prisoner *swore rashly to a matter which he never saw nor knew;* as, where he swore

[1] Commonwealth *v.* Pollard, 12 Met. 225; Rex *v.* Lee, 2 Russ. on Crimes, 650; The State *v.* Hayward, 1 N. & McC. 546. It seems that perjury may be assigned upon a statement literally true, but designedly used to convey a false meaning, and actually understood in such false sense; the rule being, that, "if the words are false in the only sense in which they relate to the subject in dispute, it is sufficient to convict of perjury; though in another sense, foreign to the issue, they might be true." 1 Gilb. Ev. by Lofft, p. 661; Rex *v.* Aylett, 1 T. R. 63. Whether, if a witness swears to that which he believes to be false, but which is in fact true, he can be convicted of perjury, *quære;* and see 3 Inst. 166; Bract. lib. 4, fol. 289.

[2] Rex *v.* Munton, 3 C. & P. 498.

[3] The State *v.* Hascall, 6 N. Hamp. 352.

[4] Martin *v.* Miller, 4 Mis. 47.

[5] Rex *v.* Carr, 1 Sid. 418; 2 Keb. 576, 2 Russ. on Crimes, 666. The same general principle is recognized in Rex *v.* Jones, 1 Peake's Cas. 38; Rex *v.* Dowlin, Id. 170; Rex *v.* Rowley, Ry. & M. 299.

positively to the value of goods, of which he knew nothing, though his valuation was correct;[1] or, where he swore falsely to a matter, the truth of which, though he believed, yet, *he had no probable cause for believing*, and might with little trouble have ascertained the fact. Thus, where the prisoner, having been shot in the night in a riot, made complaint on oath before a magistrate against a particular individual, as having shot him; and two days afterwards testified to the same fact upon the examination of the same person upon that charge; upon which oath perjury was assigned; and upon clear proof that this person was at that time at a place twenty miles distant from the scene, the *alibi* was conceded, and the prisoner's defence was placed upon the ground of honest mistake of the person; the Jury were instructed that they ought to acquit the prisoner, if he had any reasonable cause for mistaking the person; but that if it were a rash and presumptuous oath, taken without any probable foundation, they ought to find him guilty, though he might not have been certain that the individual charged was not the person who shot him. And this instruction was held right.[2]

§ 201. In DEFENCE against an indictment for perjury, it may be shown, that the oath was given before a Court or a Magistrate having *no jurisdiction* in the cause or matter in question; as, for example, that the oath was given before a Judge, out of the limits of the State in which he was commissioned;[3] or, in a suit previously abated by the death of the party;[4] or the like.[5] It may also be shown, that the testimony was given by surprise, or inadvertency, or under a mere *mistake*, for which the witness was not culpable, and in respect of which he ought to be charitably judged;[6] or, that it was in a point *not material* to the issue;[7] or that it was *true*. But if there be several assignments of perjury in the same indictment, and as to one of them no evidence is given by the

[1] 3 Inst. 166; [The People *v.* McKinney, 3 Parker, C. R. 510.]

[2] Commonwealth *v.* Cornish, 6 Binn. 249. [But a false swearing, "to the best of the opinion of the witness," to a statement which is not true and which the witness has no reasonable cause to believe to be true, but which he does believe to be true, is not perjury. Commonwealth *v.* Brady, 5 Gray, 78.]

[3] Jackson *v.* Humphrey, 1 Johns. 498.

[4] Rex *v.* Cohen, 1 Stark. R. 511.

[5] Paine's case, Yelv. 111; Boling *v.* Luther, 2 Taylor, 202; The State *v.* Alexander, 4 Hawks, 182; The State *v.* Hayward, 1 N. & McC. 546; Commonwealth *v.* White, 8 Pick. 453; The State *v.* Furlong, 26 Maine, 69; Muir *v.* The State, 8 Blackf. 154; Lambden *v.* The State, 5 Humph. 83.

[6] Rex *v.* Melling, 5 Mod. 348, 350; Regina *v.* Muscot, 10 Mod. 195; 2 McNally's Ev. 635. In Rex *v.* Crespigny, 1 Esp. R. 280, the mistake was in regard to the legal import of a deed. See acc. The State *v.* Woolverton, 8 Blackf. 452.

[7] The State *v.* Hathaway, 2 N. & McC. 118; Hinch *v.* The State, 2 Mis. 158.

prosecutor, no evidence will be admitted, on the part of the defendant, to prove that in fact the matter, charged in the assignment to be false, was in reality true.[1]

§ 202. In regard to the *competency of the party injured*, as a witness to prove the perjury, it was formerly the course to exclude him, where it appeared that the result of the trial might probably be to his advantage in ulterior proceedings elsewhere. Thus, where he expected that the defendant would be the only witness, or a material witness against him in a subsequent trial;[2] or, where, by the ordinary course in Chancery, he might, upon the conviction of the defendant, obtain an injunction of further proceedings at law,[3] he has been rejected as incompetent. But the modern rule places the prosecutor in the same position as any other witness, rejecting him only where he has a *direct*, *certain*, *and immediate interest* in the record, or is otherwise disqualified, on some of the grounds stated in a preceding volume.[4] But where the defendant is a material witness against the prosecutor, in a cause still pending, the Court will in their discretion suspend the trial of the indictment until after the trial of the civil action.

[1] Rex *v.* Hemp, 5 C. & P. 468.

[2] Rex *v.* Dalby, 1 Peake, R. 12; Rex *v.* Hulme, 7 C. & P. 8.

[3] Rex *v.* Eden, 1 Esp. R. 97.

[4] See *ante*, Vol. 1, §§ 387, 389, 390, 403, 404, 407, 411–413. And see The State *v.* Bishop, 1 D. Chipm. 120 (Vt.); The State *v.* Pray, 14 N. Hamp. 464.

# POLYGAMY.

[* § 203. Originally of ecclesiastical cognizance.
204. Proving first and second marriages, and that former husband or wife was alive at second marriage sufficient.
205. Second marriage must be proved to have been legal, save that first husband or wife was then alive.
206. Person with whom second marriage was had, competent witness to prove it.
207. First husband or wife must be proved to be living at time of second marriage.
208. Defences.]

§ 203. This offence consists in having *a plurality of wives at the same time.* It is often termed *bigamy;* which, in its proper signification, only means having had two wives in succession. It was originally considered as of ecclesiastical cognizance; but the benefit of clergy was taken away from it by the statute *De Bigamis;*[1] and afterwards it was expressly made a capital felony.[2]

§ 204. The indictment states the *first* and *second marriages*, and alleges that at the time of the second marriage, the *former* husband or wife was *alive.* The proof of these three facts, therefore, will make out the case on the part of the prosecution. In regard to the *first marriage*, it is sufficient to prove that a marriage in fact was celebrated according to the laws of the country in which it took place; and this, even though it were voidable; provided it were not absolutely void.[3] This may be shown by the evidence of persons present at the marriage, with proof of the official character of the celebrator; or, by documents legally admissible, such as a copy of the Register, where registration is required by law, with proof of the identity of the person; or, by the deliberate admission of the prisoner himself.[4]

[1] 4 Edw. 1, ch. 5.
[2] 1 Jac. 1, ch. 11, § 1; 1 East, P. C. 464.
[3] *Ante*, Vol. 2, tit. Marriage, § 461. And see Bishop on Marriage and Divorce, ch. 17, where the evidence of marriage is more fully treated.
[4] See *ante*, Vol. 1, §§ 339, 484, 493; Vol. 2, § 461; Truman's case, 1 East, P. C. 470; The State *v.* Ham, 11 Maine, 391;

§ 205. In proof of the *second marriage*, the same kind of evidence is admissible as in proof of the first. But it must distinctly appear, that it was a marriage in all respects legal, except that the first husband or wife was then alive; that it was celebrated within the county, unless otherwise provided by statute; and that the person, with whom the second marriage was had, bore the name mentioned in the indictment.[1] Proof of a second marriage by reputation alone, is not sufficient. The description of the person, too, though unnecessarily stated in the indictment, must be strictly proved as alleged. Thus, where the person was styled a widow, but it appeared in evidence that she was in fact and by reputation a single woman, the variance was held fatal.[2]

§ 206. If the first marriage is clearly proved, and not controverted, then the person, with whom the second marriage was had, may be admitted as a witness to prove the second marriage, as well as other facts, not tending to defeat the first, or to legalize the second. Thus, it is conceived, she would not be admitted to prove a fact, showing that the first marriage was void, such as relationship within the degrees, or the like; nor that the first wife was dead, at the time of the second marriage; nor ought she to be admitted at all, if the first marriage is still a point in controversy.[3]

§ 207. There must also be proof that the first husband or wife was *living at the time of the second marriage*. And for this purpose it is said that the mere presumption of the continuance of life is not sufficient, without the aid of other circumstances, though seven years have not expired since the last intelligence was had in regard to the absent person.[4]

§ 208. The DEFENCE may be made by disproving either of the

Woolverton *v.* The State, 16 Ohio, 173; [Regina *v.* Manwaring, 37 Eng. Law & Eq. R. 609. But the first marriage cannot be proved by the confessions of the defendant, though supported by proof of cohabitation, and reputation. Gahagan *v.* The People, 1 Parker, C. R. 378. And when the first marriage was contracted abroad, the prosecution must prove its validity by the foreign law. People *v.* Lambert, 5 Mich. 409.] [* Evidence that the person by whom a marriage ceremony was performed was reputed to be, and that he acted as a magistrate or minister, is admissible, and is sufficient *primâ facie* proof of his official or ministerial character. And where a marriage ceremony is performed by a person purporting to be a minister, and by whom a marriage certificate is given: and one of the parties to the ceremony speaks of it as a valid and real marriage, and refers to the certificate in support of his declaration, and he is subsequently indicted and tried for bigamy on account of such marriage ceremony, his declarations in reference to it are admissible, both as evidence of identity and of the marriage; and for the former purpose the marriage certificate itself would be admissible in connection with his declarations respecting it. State *v.* Abbey, 29 Vt. 60.]

[1] Drake's case, 1 Lewin, C. C. 25.

[2] Rex *v.* Deeley, 1 Moody, C. C. 303; 4 C. & P. 579; *Ante*, Vol. 1, § 65.

[3] See *ante*, Vol. 1, § 339; 1 Hale, P. C. 693; 1 East, P. C. 469; 1 Russ. on Crimes, 218.

[4] Rex *v.* Twyning, 2 B. & Ald. 386.

points above stated. Thus, where a woman married a second husband abroad, in the lifetime of the first; and afterwards the first died; and then she married a third in England, in the lifetime of the second, and for this third marriage she was indicted; upon proof that the first husband was living when the second marriage was had, it was held a good defence to the indictment, the second marriage being a nullity, and the third therefore valid.[1] But the prior marriage must be shown to be absolutely void; for if it were only voidable and not avoided previous to the second marriage, it is no defence.[2] The defence may also be made, by showing that that prisoner's case comes within any of the *exceptions* found in the statutes, which the several States have enacted on this subject; such as, absence of the former partner for more than seven years, unheard of;[3] previous divorce *a vinculo matrimonii;* or the like.

[1] Lady Madison's case, 1 Hale, P. C. 693.

[2] 3 Inst. 88.

[3] [Under the English statute, where a husband has been absent more than seven years, and the Jury find that there is no evidence that the wife knew that the husband was alive, at the time of her second marriage, but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them, it was held that a conviction could not be sustained. Regina *v.* Briggs, 1 Dears. & Bell, 98.] [* And the onus of proving the absence of such knowledge rests on the prosecution. Reg. *v.* Curgerwen, 11 Jur. N. S. 984.]

## RAPE.

[*§ 209. Rape defined.
210. Proof of penetration sufficient.
211. Circumstances proving *force* and *absence of previous consent.*
212. Defence consists in controverting evidence of the fact or of the force.
213. Particular facts stated by prosecutrix in making complaint not admissible.
214. Character of prosecutrix for chastity must be impeached by general evidence.
215. That prisoner was under fourteen years of age at the time, a defence.]

§ 209. This offence is *defined* to be the unlawful *carnal knowledge* of a woman, by *force* and *against her will*.[1] These facts are the principal allegations in the indictment.

§ 210. In the proof of *carnal knowledge*, it was formerly held, though with considerable conflict of opinion, that there must be evidence both of penetration and of injection. But the doubts on this subject were put at rest in England, by the statute of 9 Geo. 4, c. 31, which enacted that the former of the two facts was sufficient to constitute the offence. Statutes to the same effect have been passed in some of the United States.[2] But as the essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue, these statutes are to be regarded merely as declaratory of the common law, as it has been held by the most eminent Judges and Jurists both in England and this country.[3]

[1] 1 East, P. C. 434. And see 2 Inst. 180, 181; 3 Inst. 60; 4 Bl. Comm. 210; 1 Russ. on Crimes, 675. [* In Reg. *v.* Fletcher, 5 Jur. N. S. 179, it was held that rape was the ravishing a woman without her consent, and it was said by Willes, J., that in a case tried before him of a rape upon an idiot girl, he directed the Jury that, if they were satisfied that the girl was in such a state of idiotcy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty; but he also told them that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape. — An indictment for rape need not aver that the woman ravished was not the wife of the defendant, "because a man may be principal in the second degree in the commission of that crime on his wife; and as under our statutes he would be liable in such case to be presented in the same manner as the principal felon, he may be so charged in the indictment." Bigelow, C. J. Commonwealth *v.* Forgerty, 8 Gray, 489. But under an indictment for rape, in which there is no averment that the person of whom the defendant had carnal knowledge was not his wife, a conviction for fornication cannot be sustained. Commonwealth *v.* Murphy, 2 Allen, 163. In every written legal accusation of the crime of rape it must be laid as a felony. Mears *v.* Commonwealth, 2 Grant's Cases, 385.]

[2] See *New York*, Rev. Stat. Vol. 2, p. 820, § 18; *Michigan*, Rev. Stat. 1846, ch. 153, § 20; *Iowa*, Code of 1851, art. 2997; *Arkansas*, Rev. Stat. 1837, ch. 45, § 163.

[3] 3 Inst. 59, 60; 1 Hale, P. C. 628; 1 East, P. C. 436, 437; Rex *v.* Russen, 1 East, P. C. 438; Rex *v.* Sheridan, Ibid.; 1 Russ. on Crimes, 678; Commonwealth

§ 211. The allegation of *force* and the *absence of previous consent* is proved by any competent evidence, showing that either the person of the woman was violated, and her resistance overcome by physical force, or that her will was overcome by the fear of death or by duress. In either case the crime is complete, though she ceased all resistance before the act itself was finally consummated. And if she was taken at first with her own consent, but was afterwards forced, against her will; or was first violated, and afterwards forgave the ravisher and consented to the act; or if she was his concubine, or a common strumpet; still the particular offence in question being committed by force and against her will at the time of its commission, this crime is in legal estimation completed; these circumstances being only admissible in evidence on the part of the defendant, to disprove the allegation of the want of consent.[1] So, if the prisoner rendered the woman intoxicated or stupefied with liquor, or chloroform, or other means, in order to have connection with her in that state, which purpose he accomplished, he may be convicted of this crime.[2] If the female was of tender age, the law conclusively presumes that she did not consent; and this age, being not precisely determined in the common law, was settled, by the statute of 18 Eliz. c. 7, at ten years.[3] If the act were perpetrated upon a married woman, by

*v.* Thomas, Virg. Cas. 307; Pennsylvania *v.* Sullivan, Addison, 143; The State *v.* Leblanc, Const. Rep. 354. As to what constitutes penetration, see Regina *v.* Lines, 1 C. & P. 393; Regina *v.* Stanton, Id. 415; Regina *v.* Hughes, 9 C. & P. 752; Regina *v.* Jordan, Id. 118; Regina *v.* McRue, 8 C. & P. 641.

[1] 1 Russ. on Crimes, 677; 1 East, P. C. 444, 445; Wright *v.* The State, 4 Humph. 194.

[2] Regina *v.* Champlin, 1 C. & K. 746; 1 Denison, C. C. 89. In this case, the prosecutrix was made insensible by liquor administered to her by the prisoner, for the purpose of exciting desire, and whilst she was in that condition he had connection with her. A majority of the Judges held that he was guilty of rape. In the Addenda to 1 Denison, C. C. 1, there is the following note of the reasons for this decision, supplied by Parke, B.: "Of the Judges who were in favor of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility and has no power over her will, whether such state is caused by the man or not, the accused knowing, at that time, that she is in that state; and Tindal, C. J., and Parke, B., remarked, that in a stat. of Westminster 2, ch. 34, the offence of rape is described to be ravishing a woman 'where she did not consent,' and not ravishing *against her will*. But all the ten Judges agreed, that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because he had attempted to procure her consent and failed, the offence of rape was committed." The three dissenting Judges appear to have thought that this could not be considered as sufficiently proved.

[3] 4 Bl. Comm. 212; 1 Hale, P. C. 631; 1 East, P. C. 436; Hays *v.* The People, 1 Hill (N. Y.), 351. [* See Smith *v.* State, 12 Ohio (N. S.), 466, where the question is discussed and the authority of Hays *v.* The People, doubted.] [If a Jury finds that the prosecutrix, a girl between ten and twelve years of age, was a consenting party to indecent liberties taken by the prisoner, he cannot be convicted of an assault. 7 Cox, 645.]

fraudulently and successfully personating her husband, and coming to her bed in the night, it is not a rape, but an assault.[1]

§ 212. The *defence* against this charge generally consists in controverting the evidence of the fact or of the force adduced on the part of the prosecution. It is to be remembered, as has been justly observed by Lord Hale, that it is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent.[2] The party injured is legally competent as a witness, but her credibility must be left to the Jury, upon the circumstances of the case which concur with her testimony; as, for example, whether she is a person of good fame; whether she made complaint of the injury as soon as was practicable, or without any inconsistent delay; whether her person or garments bore token of the injury done to her; whether the place was remote from passengers, or secure from interruption; and whether the offender fled; or the like. On the other hand, if she be of ill fame, and stands unsupported by other evidence; or if she concealed the injury for any considerable time after she had opportunity to complain; or if the act were done in a place where other persons might have heard her cries, but she uttered none; or if she gave wrong descriptions of the place, or the place was such as to render the perpetration of the offence there improbable; these circumstances, and the like, will proportionably diminish the credit to be given to her testimony by the Jury.[3]

§ 213. Though the prosecutrix may be asked *whether she made complaint of the injury*, and when and to whom; and the person to whom she complained is usually called to prove that fact; yet the particular facts which she stated are not admissible in evidence,

[1] Regina *v.* Saunders, 8 C. & P. 265; Regina *v.* Williams, Id. 286; Rex *v.* Jackson, Russ. & Ry. C. C. 486; 1 Leading Crim. Cases, 234; Regina *v.* Clarke, 6 Cox, C. C. 512; 1 Leading Crim. Cases, 232; 29 Eng. Law & Eq. R. 542. A medical practitioner had sexual connection with a young girl of the age of fourteen, who had for some time been receiving medical treatment from him. The Jury found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief, that the defendant was (as he represented) treating her medically, with a view to her cure. It was held that he was guilty of an assault, and it seems that he might have been indicted for rape. Regina *v.* Case, 1 Denison, C. C. 580; 1 Eng. Law & Eq. R. 544; Temple & Mew, C. C. 318; 4 Cox, C. C. 220; *Ante*, § 59.

[2] 1 Hale, P. C. 635. [* In State *v.* Lattin, 29 Conn. 389, where the defendant had been convicted of the crime of carnally knowing and abusing a female child under the age of ten years, upon the uncorroborated testimony of the child herself, who was nine years of age, it was held on the motion of the defendant for a new trial for a verdict against evidence, that it was not necessary, to warrant the conviction, that the testimony of the child should have been confirmed by an examination of her person at the time, or by medical testimony.]

[3] 1 Hale, P. C. 633; 1 East, P. C. 445; 1 Russ. on Crimes, 688, 689.

except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no.[1] Indeed, the complaint constitutes no part of the *res gestæ;* it is only a fact corroborative of the testimony of the complainant; and where she is not a witness in the case, it is wholly inadmissible.[2]

§ 214. The *character of the prosecutrix for chastity*, may also be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity.[3] Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible.[4]

§ 215. It may also be shown, in defence, that the prisoner was at the time *under the age of fourteen years;* prior to which age the law presumes that he was incapable of committing this offence; and this presumption is by the common law conclusive.[5] Under

[1] Regina *v.* Walker, 2 M. & Rob. 212; Regina *v.* Megson, 9 C. & P. 420; The People *v.* McGee, 1 Denio, 19; Phillips *v.* The State, 9 Humph. 246; Rex *v.* Clarke, 2 Stark. R. 241; 1 Russ. on Crimes, 689, 690, and note by Greaves; [Brogg *v.* The Commonwealth, 10 Grattan, 722.]

[2] Regina *v.* Guttridge, 9 C. & P. 471; Regina *v.* Nicholas, 2 C. & K. 246; The People *v.* McGee, 1 Denio, 19. [* But see State *v.* Peter, 14 La. An. 521. And the declarations of the prosecutrix when in travail as to the paternity of the child, are not admissible, especially if she be a witness. State *v.* Hussey, 7 Clarke (Iowa), 409.] [The prosecutrix may be asked by the government, whether the acts were done with her consent or against her will. Woodin *v.* The People, 1 Parker, C. R. 464.] [* In Reg. *v.* Eyre, 2 F. & F. 579, it was held that not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, is evidence. — On an indictment for rape on a child under ten, evidence was admitted of subsequent perpetrations of the same offence on different days previously to complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion. Held that, virtually, in such a case it was all one continuous offence. Reg. *v.* Rearden, 4 F. & F. 76.]

[3] Rex *v.* Clarke, 2 Stark. R. 241; Rex *v.* Barker, 3 C. & P. 589; Regina *v.* Clay, 5 Cox, C. C. 146. And see *ante*, Vol. 1, § 54; The State *v.* Jefferson, 6 Ired. 305; The People *v.* Abbott, 19 Wend. 192; Camp *v.* The State, 4 Kelly, 417.

[4] Rex *v.* Hodgson, Russ. & Ry. C. C. 211; 1 Leading Crim. Cases, 228; Rex *v.* Aspinwall, 2 Stark. Evid. 700; [* McCombs *v.* State, 8 Ohio (N. S.), 643.] The soundness of this distinction was questioned by Williams, J., in Rex *v.* Martin, 6 C. & P. 562; and in *New York* and *North Carolina* evidence of previous intercourse with other persons, has been held admissible, as tending to disprove the allegation of force. See The People *v.* Abbott, and The State *v.* Jefferson, *supra;* Regina *v.* Robins, 2 M. & Rob. 512; [The People *v.* Jackson, 3 Parker, C. R. 391; State *v.* Johnson, 2 Wms. (Vt.), 512.]

[5] 1 Hale, P. C. 630; 4 Bl. Comm. 212; Rex *v.* Eldershaw, 2 C. & P. 396; Rex *v.* Groombridge, 7 C. & P. 582; Regina *v.* Phillips, 8 C. & P. 736; Regina *v.* Jordan, 9 C. & P. 118; Commonwealth *v.* Green, 2 Pick. 380. But in *Ohio*, this presumption has been held rebuttable by proof that the prisoner had arrived at puberty. Williams *v.* The State, 14 Ohio, 222. And see Commonwealth *v.* Lanigan, 2 Law Rep. 49. [People *v.* Randolph, 2 Parker, C. R. 194.] In *California*, it is enacted that "An infant, under the age of fourteen

this age, therefore, it is held that he cannot be convicted of a felonious assault with intent to commit this crime.

years, shall not be found guilty of any crime." Rev. Stat. 1850, ch. 99, § 4.

[1] 1 Russ. on Crimes, 676; Rex *v.* Eldershaw, 3 C. & P. 396; Rex *v.* Groombridge, 7 C. & P. 582; Regina *v.* Phillips, 8 C. & P. 736; The State *v.* Handy, 4 Harringt. 556. But in Commonwealth *v.* Green, 2 Pick. 380, it was held by the learned Judges (Parker, C. J., dissenting), that a boy, under the age of fourteen years, might be lawfully convicted of an assault with intent to commit a rape; on the ground that, if near that age, he might be capable of that kind of force which constitutes an essential ingredient in the crime; and that females might be in as much danger from precocious boys as from men. And see Williams *v.* The State, *supra*. *Ideo quære.* If the crime is consummated by penetration alone, of which a boy under fourteen may be physically capable, and yet is in law conclusively presumed incapable, how can he be found guilty of an attempt to commit a crime, which, in contemplation of law, is impossible to be committed, or can have no existence? In England, this question is supposed to be put at rest by the Stat. 1 Vict. ch. 85, § 11, which enacts that "on the trial of *any person, for any felony whatever, where the crime charged shall include assault*, the Jury may acquit of the felony, and find the party guilty of an assault, if the evidence shall warrant such finding." See Regina *v.* Brimilow, 9 C. & P. 366.

# RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

[* § 216. Riots, routs, and unlawful assemblies defined.
217. Three persons at least must have been engaged to make a riot.
218. Unlawful assembling must be proved.
219. Proof of deed of violence dispenses with proof of terror.
220. Object of rioters must be proved to have been of a private nature.
221. Order of proof same as in prosecutions for conspiracy.
222. Rout and unlawful assembly how proved.]

§ 216. To constitute either of these offences, it is necessary that there be three or more persons tumultuously assembled of their own authority, with intent mutually to assist one another against all who shall oppose them in the doing either of an unlawful act of a private nature, or of a lawful act in a violent and tumultuous manner. If the act is done, in whole or in part, it is a RIOT. If no act is done, but some advance towards it is made, such as proceeding towards the place, or the like, it is a ROUT. If they part without doing it or making any motion towards it, the offence is merely that of an UNLAWFUL ASSEMBLY.[1]

[1] 4 Bl. Comm. 146; 1 Hawk. P. C. ch. 65, § 1; 1 Russ. on Crimes, 266, 272; 3 Inst. 176; The State *v.* Cole, 2 McCord, 117; The State *v.* Brooks, 1 Hill (S. Car.), 361; Pennsylvania *v.* Craig, Addison, 190; The State *v.* Snow, 18 Maine, 346; The State *v.* Connolly, 3 Rich. 337; Rex *v.* Birt, 5 C. & P. 154. In an indictment for that species of riots which consists in going about armed, &c., without committing any act, the words *in terrorem populi* are necessary, the terror to the public being of the essence of that offence; but in those riots in which an unlawful act is committed, these words are useless. Regina *v.* Soley, 11 Mod. 116, per Ld. Holt; 10 Mass. 520; Rex *v.* Hughes, 4 C. & P. 373. To disturb another in the enjoyment of a lawful right, if it be openly done by numbers unlawfully combined, is a riot. Commonwealth *v.* Runnels, 10 Mass. 518. In some of the United States, a riot is defined by statute. Thus, in *Maine*, it is enacted that, "When three or more persons together, and in a violent or tumultuous manner, commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner, to the terror or disturbance of others, they shall be deemed guilty of a riot." Rev. Stats. ch. 159, § 3. It is defined in the same words, in the Code of *Iowa*, Art. 2740. In *Missouri*, it is declared to be a riot, "If three or more persons shall assemble together with the intent, or being assembled, shall agree mutually to assist one another to do any unlawful act, with force or violence, against the person or property of another, or against the peace, or to the terror of the people, and shall accomplish the purpose intended, or do any unlawful act in furtherance of such purpose, in a violent or turbulent manner," &c. See *Missouri*, Rev. Stats. 1845, ch. 47, art. 7, § 6. The Commissioners for revising the Penal Code of *Massachusetts*, expressed their view of

§ 217. In support of the *indictment for a riot*, it must be proved, that at least *three persons* were engaged in the unlawful act; and if the evidence extends only to one or two persons, all the defendants must be acquitted of this particular charge, though the act proved against one or two might amount to an assault, or some other offence.[1]

§ 218. There must also be evidence of an *unlawful assembling;* but it is not necessary to prove that when the parties first met they came together unlawfully; for if, being lawfully together, a dispute arises, and thereupon they form into parties, with promises of mutual assistance, and then make an affray, the assemblage, originally lawful, will be converted into a riot. Nor is it necessary to show that every defendant was present at the original assemblage; for a person joining others already engaged in a riot, is equally guilty as if he had joined them at the beginning.[2] So, if persons being lawfully assembled, should afterwards confederate to do an unlawful act, and proceed to execute it by doing an act of violence in a tumultuous manner, it is a riot.[3]

§ 219. If the indictment charges the actual perpetration of a deed of violence, such as an assault and battery, or the pulling down of a house, it is not necessary to allege or prove that it was done *to the terror and disturbance of the people;* but proof of all the other circumstances alleged, will support the indictment without proving distinctly any terror. But where the offence consists in tumultuously disturbing the peace by show of arms, threatening speeches, turbulent gestures, or the like, without the perpetration of any deed of violence, it is necessary to allege and prove that such conduct was to the disturbance and terror of the good citizens of the State.[4] Yet there may be a show of arms and a numerous assemblage, without a riot. Thus, if a man should as-

this offence, at common law, in these terms: "A riot is where three or more, being in unlawful assembly, join in doing or actually beginning to do an act, with tumult and violence not authorized by law, and striking terror, or tending to strike terror, into others." See their Report, Jan., 1844, ch. 34, § 5.

[1] Rex *v.* Sudbury, 1 Ld. Raym. 484; Rex *v.* Scott, 3 Burr. 1262; Pennsylvania *v.* Huston, Addison, 334; The State *v.* Allison, 3 Yerg. 428. [But if one of three indicted for a riot be separately tried, he may be convicted on proof of a riot in which he joined with any two others. Commonwealth *v.* Berry, 5 Gray, 93.]

[2] 1 Hawk. P. C. ch. 65, § 3; Rex *v.* Royce, 4 Burr. 2073; Anon. 6 Mod. 43; The State *v.* Brazil, Rice, R. 258.

[3] The State *v.* Snow, 18 Maine, 346.

[4] 1 Hawk. P. C. ch. 65, § 5; Regina *v.* Soley, 11 Mod. 115; 2 Salk. 594, 595; Howard *v.* Bell, Hob. 91; Commonwealth *v.* Runnells, 10 Mass. 518; Clifford *v.* Brandon, 2 Campb. 358, 369; The State *v.* Brazil, Rice, R. 258; The State *v.* Brooks, 1 Hill (S. Car.), 362; Rex *v.* Hughes, 4 C. & P. 373. But see Rex *v* Cox, Id. 538.

semble his friends or others, and arm them in defence of his house or person against a threatened unlawful and violent attack; or should employ a number of persons with spades or other proper implements, to assist him in peaceably removing a nuisance, and they do so; it is neither a forcible entry nor a riot. Nor is it a riot when a sheriff or constable, or perhaps a private person, assembles a competent number of men forcibly to put down a rebellion, to resist enemies, or to suppress a riot.[1]

§ 220. It must also be shown that the object of the rioters was *of a private nature*, in contradistinction from those which concern the whole community, such as the redress of public grievances, or the obstruction of the Courts of Justice, or to resist the execution of a public statute everywhere and at all hazards; acts of this kind being treasonable. Thus, if the object of an insurrection or tumultuous assemblage be supposed to affect only the persons assembled, or be confined to particular persons or districts, such as to destroy a particular enclosure, to remove a local nuisance, to release a particular prisoner, or the like, it is not treason, but is a riot.[2] If the perpetration of an unlawful act of violence be charged as the riotous act, such as an assault and battery, it must be proved, or the parties must be acquitted; and if the offence is alleged to consist in a riotous assemblage and conduct, to the *terror of the citizens*, this part of the indictment will be supported by proof that one person only was terrified.[3]

§ 221. In proving the guilt of the defendants, as participators in the riot, *the regular and proper order of proceeding* is similar to that which is adopted in prosecutions for conspiracy, namely, first to prove the combination, and then to show what was done in pursuance of the unlawful design. But this, as we have heretofore seen, is not an imperative rule; it rests in the discretion of the Judge to prescribe the order of proofs in each particular case; and if he deems it expedient, under the special circumstances, to permit the prosecutor first to prove the riotous acts, it will be only after the whole case, on the part of the government, has been openly stated, and the prosecutor has undertaken to connect the defendants with the acts done.[4] But it will be sufficient to fix the

[1] 1 Hawk. P. C. ch. 65, § 2; 1 Hale, P. C. 487, 495, 496; 1 Russ. on Crimes, 266.

[2] 1 Hawk. P. C. ch. 65, § 6; 1 East, P. C. 75; Rex *v.* Birt, 5 C. & P. 154; Douglass *v.* The State, 6 Yerg. 525.

[3] Regina *v.* Langford, Car. & Marshm. 602; Regina *v.* Phillips, 2 Moody, C. C. 252; S. C. as Regina *v.* Langford.

[4] See *supra*, tit. CONSPIRACY, *Ante*, Vol. 1, § 51 *a*; Id. § 111; Nicholson's case, 1

guilt of any defendant, if it be proved that he joined himself to the others after the riot began, or encouraged them by words, signs, or gestures, or by wearing their badge, or otherwise took part in their proceedings.[1]

§ 222. A *rout* is proved in the same manner as a riot, the proof only showing some advance made towards a riotous act, but stopping short of its actual perpetration. And an *unlawful assembly* is proved by similar evidence, without showing any motion made towards the execution of a riotous act; or, by evidence of the assemblage of great numbers of persons, with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the people.[2] All who join such an assemblage, disregarding its probable effect, and the alarm and consternation likely to ensue; and all who give countenance and support to it, are criminal parties.[3]

Lewin, C. C. 300; 1 East, P. C. 96, § 37; Redford *v.* Birley, 3 Stark. R. 76.

[1] 1 Hale, P. C. 462, 463; Clifford *v.* Brandon, 2 Campb. 358, 370; Rex *v.* Royce, 4 Burr. 2073.

[2] 1 Hawk. P. C. ch. 65, §§ 8, 9; 1 Russ. on Crimes, 272; Rex *v.* Birt, 5 C. & P. 154; Regina *v.* Neale, 9 C. & P. 431; Regina *v.* Vincent, 9 C. & P. 91, per Alderson, B.; Rex *v.* Hunt, 3 B. & Ald. 566.

[3] Redford *v.* Birley, 3 Stark. R. 76, per Holroyd, J.

# ROBBERY.

[* § 223. Robbery defined.
224. Property of person named as owner must be proved.
225. Actual possession of goods by robber must be proved.
226. May be a *taking in law.* Illustrations.
227. Felonious intent must be proved.
228. Also a taking from the person.
229. Force may be actual or constructive.
230. Robbery may be under guise of legal proceeding.
231. Proof of putting in fear supports allegation of force.
232. Menace of danger to the person, how proved.
233. Fear of injury to one's property sufficient.
234. Also of injury to one's reputation sometimes.
235. But money must be parted with from immediate apprehension of present danger upon charge being made.
236. Dying declarations of party robbed not admissible.]

§ 223. This crime has been variously described in the books; but the most comprehensive and precise definition, is that which was given by Lord Mansfield, who "was of opinion that the true nature and original definition of robbery was, *a felonious taking of property from the person of another by force.*" [1] The personal possession of the property by the party robbed, he proceeded to say, might be actual or constructive; as, if it be in his presence lying on the ground; and so of the force; it might be physical violence, directly applied; or constructive, by threats, or otherwise putting him in fear, and thereby overcoming his will. The indictment charges — 1st, a *taking* of the goods; — 2d, that they were taken with a *felonious intent;* — 3d, *from the person* of the party robbed; — 4th, by *force.*[2]

[1] Donally's case, 2 East, P. C. 725. Robbery, by the common law, is larceny from the person, accompanied with violence, or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies. Commonwealth *v.* Clifford, 8 Cush. 216, per Metcalf, J. And see United States *v.* Jones, 3 Wash. 219; McDaniel *v.* The State, 8 S. & M. 401.

[2] The following precedent is taken from Train and Heard's Precedents of Indictments, 461.

"*Indictment for Robbery at Common Law.*

"The Jurors, etc., upon their oath present, that C. D., late of, etc., on the first

§ 224. The goods must be proved to be the *property of the person* named as owner in the indictment. If a servant, having collected money for his master, is robbed of it on his way home, it has been thought that it should still be deemed the money of the servant, until it has been delivered to the master; or otherwise the servant could not be guilty of the crime of embezzling it.[1] But the *value* is immaterial; for the forcible taking of a mere memorandum, or a paper not equal in value to any existing coin, is held sufficient to constitute this crime.[2]

§ 225. In proof of the *taking*, it is necessary to show that *the goods were actually in the robber's possession.* This point has been illustrated by the case of a purse, which the robber in a struggle with the owner cut from his girdle, whereby the purse fell to the ground without coming into the custody of the robber; which Lord Coke held to be no taking; though, if he had picked up the purse it would have been otherwise.[3] So, where the prisoner stopped the prosecutor, and commanded him to lay down a featherbed which he was carrying, or he would shoot him, and the prosecutor did so; but the prisoner was apprehended before he could take it up so as to remove it from the place where it lay; the Judges were of opinion that the offence of robbery was not completed.[4] But where a diamond ear-ring was snatched by tearing it from a lady's ear, though it was not seen actually in the prisoner's hand, and was afterwards found among the curls in the lady's hair; yet as it was taken from her person by violence, and was in the prisoner's possession, separate from her person, though but for a moment, the Judges held that the crime of robbery was completed.[5] It is not, however, sufficient, that the property be snatched away, unless it be done with *some injury to the person*, as in the case just mentioned, where the ear was torn, or unless

day of June, in the year of our Lord ——, with force and arms, at B., in the county of S., in and upon one J. N., feloniously did make an assault, and the said J. N., in bodily fear and danger of his life, then and there feloniously did put, and one gold watch of the value of one hundred dollars, of the goods and chattels of the said J. N., from the person and against the will of the said J. N. then and there feloniously and violently did steal, take, and carry away; against the peace, etc."

The indictment must allege that the articles stolen were carried away by the robber, and that they are the property of the person robbed, or of some third person. Commonwealth *v.* Clifford, 8 Cush. 215; Rex *v.* Hall, 3 C. & P. 409; Rex *v.* Rogan, Jebb, C. C. 621.

[1] Regina *v.* Rudick, 8 C. & P. 237, per Alderson, B.

[2] Rex *v.* Bingley, 6 C. & P. 602; 2 East, P. C. 707; Regina *v.* Morris, 9 C. & P. 347.

[3] 3 Inst. 69; 1 Hale, P. C. 533.

[4] Rex *v.* Farrel, 1 Leach, C. C. (4th ed.), 322, note.

[5] Rex *v.* Lapier, 1 Leach, C. C. (4th ed.), 320; Regina *v.* Simpson, 6 Cox, C. C. 422.

there be a *struggle for the possession and some violence used to obtain it.*[1]

§ 226. But there may be what is termed a *taking in law*, as well as a taking in fact, examples of which are given by Lord Hale. Thus, if thieves, finding but little about the man whom they attempt to rob, compel him by menace of death to swear to bring them a greater sum, and under influence of this menace he brings it, this evidence will sustain an indictment for robbery, in the usual form of allegation.[2] And it is the same, if the money or goods were asked for as a loan, but still obtained by assault and putting the party in fear; or if, in fleeing from the thief, the party drops his hat or purse, which the thief takes up and carries away.[3]

§ 227. The taking must also be proved to have been with *a felonious intent;* the proof of which has already been considered, in treating of the crime of larceny.[4]

§ 228. The goods must also be proved to have been *taken from the person* of the party robbed; and this possession by the party, as we have seen, may be either actual or constructive. This allegation in the indictment, therefore, may be proved by evidence that the goods were *in the presence* of the party robbed; as, if the robber having first assaulted the owner, takes away his horse standing near him; or, having put him in fear, drives away his cattle; or takes up his purse, which the owner, to save it from the robber, had thrown into the bush.[5] And it is sufficient, if it be proved that the taking by the robber was actually begun in the presence of the party robbed, though it were completed in his absence.

[1] 1 Russ. on Crimes, pp. 871, 875, 876.

[2] 1 Hale, P. C. 532, 533; 2 East, P. C. 714.

[3] 1 Hale, P. C. 533.

[4] *Supra*, § 156. If the prisoner knowingly made or intended to make an *inadequate* compensation for the goods forcibly taken, this will not absolve him from the guilt of robbery; for the intent was still fraudulent and felonious. Rex *v.* Simons, 2 East, P. C. 712; Rex *v.* Spencer, Ibid.; 1 Russ. on Crimes, p. 880. But whether, if he made, or intended at the time to make, what he in good faith deemed a sufficient compensation and complete indemnity for the goods forcibly taken, the offence amounts to robbery, or is only a forced sale and a trespass, is a point upon which there is some diversity of opinion. The English Commissioners (Fourth Report, p. 69, a, 40, n.) were of opinion that the offence was robbery. Mr. East deemed it a question for the Jury to find the intent, upon the consideration of all the circumstances. 2 East, P. C. 661, 662. The Massachusetts Commissioners seem to have regarded it as not amounting to robbery. See Report on the Penal Code of Massachusetts, 1844, tit. ROBBERY, § 17. [* A creditor having violently assaulted his debtor, and so forced him to give him a check in part payment, and having then again assaulted him, in order to force him to give him money in payment of the debt; Held, that as there was no felonious intent, he could not properly be convicted of robbery. Reg. *v.* Hemmings, 4 F. & F. 50.]

[5] 2 East, P. C. 707.

Thus, where a wagoner was forcibly stopped in the highway by a man, under the fraudulent pretence that his goods were unlawfully carried for want of a permit, and while they were gone to a magistrate to determine the matter, the man's confederates carried away the goods; this was held sufficient proof of a taking to constitute robbery.[1] But where it was found by a special verdict, that the thieves, meeting the party wronged, and desiring him to change half-a-crown, gently struck his hand, whereby his money fell to the ground; and that he dismounting and offering to take up the money, they compelled him, by menaces of instant death, to desist; and it was also found, "that the said prisoners *then and there immediately* took up the money and rode off with it"; the Court held this not to be sufficient proof of the crime of *robbery*, it not being found that they took up the money in the sight or presence of the owner.[2]

§ 229. In regard to the *force* or *violence* with which the goods were taken, this may be actual or constructive; the principle being this, that the power of the owner to retain the possession of his goods was overcome by the robber; either by actual violence physically applied, or by putting him in such fear as to overpower his will.[3] If the robbery was by actual violence, the proof of this fact will support this part of the indictment, though it should appear that the party did not know that his goods were taken; as, if he be violently pressed against a wall by the thief, who, in that mode, robs him of his watch, without his knowledge at the time.[4] So, if

[1] Merriman *v.* The Hundred of Chippenham, 2 East, P. C. 709; 1 Russ. on Crimes, 876.

[2] Rex *v.* Frances, 2 Com. R. 478. In expounding the above clause in the special verdict, the learned Judges said: "It was not denied but that if a thief set upon a man to rob him, and he throw away his money or his goods (being near him and in his presence), and was forced away by terror, and the thief took them, it would be robbery; and therefore here possibly it might have been well if the Jury had found, that when Cox desisted, the prisoners at the same time, or without any intermediate space of time, or instantly, took it up; but the word *immediately* has great latitude, and is not of any determinate signification; it is in dictionaries explained by *cito, celeriter:* in writs returnable *immediate* it has a larger construction, as soon as conveniently it can be done. In Mawgridge's case it is twice mentioned, but with words added to ascertain it, as *without intermission, in a little space of time,* &c. In the statute 27 Eliz. it is directed that notice be given as soon as conveniently may be; in the pleadings that is usually expressed by *immediate;* so that *then and there immediately* doth not necessarily ascertain the time, but leaves it doubtful. Besides, it is proper to take notice, that in this verdict the words *then and there immediately* are not coupled in the same clause or sentence with the words preceding; but it is a distinct clause and a separate finding." Id. pp. 480, 481. And see 2 Stra. 1015, S. C.

[3] It is not necessary to allege that the party robbed was *put in fear;* nor is it necessary to prove that he was intimidated, if the robbery was by actual violence. Commonwealth *v.* Humphries, 7 Mass. 242; Commonwealth *v.* Clifford, 8 Cush. 215, 217.

[4] Commonwealth *v.* Snelling, 4 Binn. 379.

a thing be feloniously taken from the person of another with such violence as to occasion a substantial corporal injury, as, by tearing the ear, in plucking away an ear-ring,[1] or the hair, in snatching out an ornament from the head ;[2] or if it be obtained by a violent struggle with the possessor, which causes a sensible concussion of his person, provided it be so attached to the person or clothes as to afford resistance ;[3] as, if it be his sword, worn at his side.[4] But where it appeared that the article was taken without any sensible or material violence to the person, as, for example, snatching a hat from the head, or a cane or umbrella from the hand of the wearer, rather by sleight of hand and adroitness than by open violence, and without any struggle on his part ; it has been ruled to be not robbery, but mere larceny from the person.[5]

§ 230. If it be proved that there was a felonious intent to obtain the goods, and that violence was used, but that this was done *under the guise of legal proceeding*, it will still support an indictment for robbery.[6] And if the violence be *used for another purpose*, as in the case of assault with intent to ravish, and money being offered to the criminal to induce him to desist, he takes the money, but persists in his original purpose, it is robbery.[7]

§ 231. Evidence that the money or goods were obtained from the owner by *putting him in fear*, will support the allegation that they were taken *by force*. And the law, *in odium spoliatoris*, will presume fear, wherever there appears a just ground for it.[8] The fear may be, of injury to the *person ;* or, to the *property ;* or, to the *reputation* ; and the circumstances must be such as to indicate a felonious intention on the part of the prisoner. The fear, also, must be shown to have continued upon the party, up to the time when he parted with his goods or money ; but it is not necessary to prove any *words of menace*, if the conduct of the prisoner were sufficient without them ; as, if he begged alms with a drawn sword ;

[1] Rex *v.* Lapier, 1 Leach, C. C. (4th ed.), 320 ; 2 East, P. C. 557, 708.

[2] Rex *v.* Moore, 1 Leach, C. C. (4th ed.), 335.

[3] Rex *v.* Mason, Russ. & Ry. C. C. 419.

[4] Rex *v.* Davies, 2 East, P. C. 709.

[5] Rex *v.* Steward, 2 East, P. C. 702 ; Regina *v.* Danby, Ibid. ; Rex *v.* Baker, Ibid. ; 1 Leach, C. C. (4th ed.), 290 ; Rex *v.* Horner, 2 East, P. C. 703 ; The State *v.* Trexler, 2 Car. Law Repos. 90 ; Rex *v.* Macauley, 1 Leach, C. C. (4th ed.), 287. Thus, where A. asked B. what o'clock it was, and B. took out his watch to tell him, holding his watch loosely in both hands, A. caught hold of the ribbon and key attached to the watch, and snatched it from B. and made off with it. This was held not to be robbery, but a larceny from the person. Regina *v.* Walls, 2 C. & K. 214.

[6] See Merriman *v.* The Hundred of Chippenham, 2 East, P. C. 709 ; Rex *v.* Gascoigne, Ibid. ; 1 Russ. on Crimes, 876, 877.

[7] Rex *v.* Blackham, 2 East, P. C. 711 ; 1 Russ. on Crimes, 878.

[8] Foster, Cr. L. 128, 129.

or, by similar intimidation, took another's goods under color of a purchase, for half their value, or the like.[1] It is only necessary to prove that the fact was attended with those circumstances of violence or terror, which, in common experience, are likely to induce a man unwillingly to part with his money for the safety of his person, property, or reputation.[2]

§ 232. Menace of *danger to the person* may be proved not only by direct evidence of threats, but by evidence that the prisoner and his companions hung round the prosecutor's person so as to render all attempts at resistance hazardous, if not vain; and in that situation rifled him of his property; or by proof of any other circumstances, showing just grounds of apprehension of bodily harm, to avoid which the party *while under the influence of such apprehension*, gave up his money.[3] If, therefore, robbers finding but little money on the person of their victim, enforce him, by menace of death, to swear to bring to them a greater sum, and *while the fear of that menace still continues upon him* he delivers the money, it is robbery.[4] It is also said, that menace of the *destruction of one's child* creates a sufficient fear to constitute robbery; but no direct adjudication is found upon this point, though it perfectly agrees with the principles of the law in other cases.[5]

[1] 2 East, P. C. 711, 712.

[2] Foster, Cr. L. 128. On this point Mr. East makes the following observations: "It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is nowhere defined in any of the acknowledged treatises upon this subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. 1 Hale, 534. Lord Coke and Hawkins do the same. 3 Inst. 68; 2 Hawk. Ch. 34. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of the party*, and he lays the circumstance of fear out of the question; or that at any rate when the fact is attended with circumstances of violence or terror, the law *in odium spoliatoris* will presume fear if it be necessary, where there appears to be so just a ground for it. Foster, 123, 128. Mr. Justice Blackstone leans to the same opinion. 4 Bl. Comm. 242. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of anything from the person or in the presence of another *openly, and against his will;* Staundf. lib. 1, c. 20; and Bracton also rests it upon the latter circumstance. Brac. lib. 3, fol. 150, b. I have the authority of the Judges as mentioned by Willes, J., in delivering their opinion in Donnally's case, at the O. B. 1779, to justify me in not attempting to draw the exact line in this case; but thus much I may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury; and, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence, or assault upon the person." 2 East, P. C. 713. See also the remarks of Hotham, B., in Donnally's case, Id. 718; Rex *v.* Taplin, 2 East, P. C. 712.

[3] Rex *v.* Hughes, 1 Lewin, C. C. 301; 1 Russ. on Crimes, 879.

[4] 2 East, P. C. 714; 1 Hale, P. C. 532.

[5] Rex *v.* Donnally, 2 East, P. C. 715, 718, per Hotham, B.; 1 Leach, C. C. (4th

§ 233. The *fear of injury to one's property* may also be sufficient to constitute this offence. Thus, where money was given to a mob, under the influence of fear arising from threats,[1] or just apprehension[2] that they would destroy the party's house, it has been held to be robbery. So, where a mob compelled the possessor of corn to sell it for less than its value, under threats that if he refused they would take it by force; this also was held to be robbery.[3] And it is held, that the prosecutor, in support of the charge, may give in evidence other similar conduct of the same prisoners, at other places on the same day, before and after the particular transaction in question.[4]

§ 234. As to the fear of *injury to the reputation*, it has been repeatedly held, that to obtain money by threatening to accuse the party of an unnatural crime, whether the consequences apprehended by the victim were a criminal prosecution, the loss of his place, or the loss of his character and position in society, is robbery.[5] And it is immaterial whether he were really guilty of the unnatural crime or not; for if guilty, it was the prisoner's duty to have prosecuted and not to have robbed him.[6] But where the money was given at a time appointed, not from fear of the loss of reputation, but for the purpose of prosecuting the offender, it has been held not to constitute robbery.[7]

§ 235. But it has also been held, that in order to constitute robbery in cases of this sort, the money must be parted with *from an immediate apprehension of present danger, upon the charge being made;* and not where the party has had time to deliberate and opportunity to consult friends, and especially where he has had

ed.), 193; Rex *v.* Reane, 2 East, P. C. 735, 736, per Eyre, C. J.; 1 Russ. on Crimes, 880, 892. Bracton, in treating of the fear that will vitiate a pretended gift of good, says: Et non solum excusatur quis qui exceptionem habet, si sibi ipsi inferatur vis vel metus; sed etiam si suis, ut si filio vel filiæ, fratri vel sorori, vel aliis domesticis et propinquis; Bracton, lib. 2. De acquirendo rerum dominio, Cap. 5, § 13, fol. 16 *b;* and he cites a case in which a grant of the manor of Middleton was held void, it being obtained by duress of imprisonment of the grantor's brother, and to procure his release. But it has been held, that where a wife was compelled to give money, under threats of accusing her husband of an unnatural crime, it was not robbery. Rex *v.* Edwards, 5 C. & P. 518.

[1] Rex *v.* Brown, 2 East, P. C. 731; Rex *v.* Simons, Ibid.

[2] Rex *v.* Astley, 2 East, P. C. 729; Rex *v.* Winkworth, 4 C. & P. 444.

[3] Rex *v.* Spencer, 2 East, P. C. 712, 713.

[4] Rex *v.* Winkworth, 4 C. & P. 444, per Vaughan, B., and Parke and Alderson, Js. See *supra*, § 15.

[5] Rex *v.* Donnally, 2 East, P. C. 715; 1 Leach, C. C. (4th ed.), 193; Rex *v.* Hickman, 2 East, P. C. 728; Rex *v.* Jones, Id. 714; Rex *v.* Elmstead, 1 Russ. on Crimes, 894; Rex *v.* Egerton, Id. 895; Russ. & Ry. 375. If the language of the charge is equivocal, it may be connected with what was afterwards said by the prisoner, when he was taken into custody. Regina *v.* Kain, 8 C. & P. 187; [The People *v.* McDaniels, 1 Parker, C. R. 198.]

[6] Rex *v.* Gardner, 1 C. & P. 479.

[7] Rex *v.* Fuller, 1 Russ. on Crimes, 896; Russ. & Ry. C. C. 408.

their advice not to give the money, and the presence of a friend when he gave it; for this would seem to give it the character rather of the composition of a prosecution than of a robbery.[1] And it may be added, that in all the cases in which the fear of injury to the reputation has been held sufficient to constitute the offence robbery, the charge threatened was that of unnatural practices. Whether any other threat, affecting the reputation, would suffice, is not known to have been decided, and may possibly admit of doubt.[2]

§ 236. On the trial of an indictment for *robbery*, the *dying declarations* of the person robbed are not admissible in evidence against the prisoner; such evidence, though sometimes formerly received, being now held admissible only upon the trial of a charge for the murder of the declarant.[3]

[1] Rex *v.* Jackson, 1 East, P. C., Addenda, xxi. And see Rex *v.* Cannon, Russ. and Ry. C. C. 146; 1 Russ. on Crimes, 894; Rex *v.* Reane, 2 East, P. C. 734. The like distinction is recognized in the law of Scotland. Alison's Prin. Crim. L., pp. 231, 232.

[2] Threats of a criminal prosecution for passing counterfeit money have been held insufficient. Britt *v.* The State, 7 Humph. 45.

[3] See *ante*, Vol. 1, § 156; Rex *v.* Mead, 2 B. & C. 605; Rex *v.* Lloyd, 4 C. & P. 233; Wilson *v.* Boerem, 15 Johns. 286.

# TREASON.

[* § 237. Definitions of treason in the Constitution of the United States and of the several States.
238. Misprision of treason defined.
239. In both cases allegiance of prisoner to State must be alleged and proved.
240. An overt act must be alleged and proved.
241. Overt acts not alleged may be proved to show *traitorous intention*.
242. Constructive levying of war sufficient, and what amounts to such.
243. Constructive presence of prisoner sufficient.
244. What acts prove *adhering to the public enemies, and giving them aid and comfort*.
245. All the *particeps criminis* are principals.
246. Two witnesses necessary and in many States to the *same* overt act.
247. Rules of common law regulate proof of misprision of treason, unless regulated by statute.
248. Confession not sufficient, unless made in open court.]

§ 237. TREASON *against the United States*, as defined in the Constitution, "Shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." And it is added, that "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court." [1] By the Crimes Act, this offence may be committed "within the United States or elsewhere," and is expressly limited to persons owing allegiance to the United States.[2] In most of the several States, *treason against the State* is defined in the same words, or in language to the same effect; and the same amount of evidence is made necessary to a conviction; [3]

[1] Const. U. S. art. 3, § 3. But treason is also a crime by the common law. Respublica *v.* Chapman, 1 Dall. 56; 1 Hale, P. C. 76; 3 Inst. 4; 4 Bl. Comm. 75, 76.

[2] Stat. April 30, 1790, § 1, Vol. 1, p. 112 (Peters's ed.).

[3] See *Maine*, Const. art. 1, § 12; Rev. Stat. 1840, ch. 153, §§ 1, 2; *Massachusetts*, Rev. Stat. 1836, ch. 124, §§ 1, 2; *New Hampshire*, Rev. Stat. 1842, ch. 213, § 1; *Rhode Island*, Rev. Stat. 1844, Crimes Act, §§ 1, 3, pp. 377, 378; *Connecticut*, Const. art. 9, § 4; *Delaware*, Const. art. 5, § 3; *Virginia*, Code of 1849, ch. 190, § 1; *Alabama*, Const. art. 6, § 2; *Texas*, Const. 1845, art. 7, § 2; *California*, Rev. Stat. 1850, ch. 99, § 17; *Michigan*, Const. art. 1, § 16; *Indiana*, Const. art. 11, §§ 2, 3; *Arkansas*, Const. art. 7, § 2; Rev. Stat. 1837, ch. 44, div. 2, § 1. p. 238; *Missouri*, Const. art. 13, § 15; *Wisconsin*, Const. art. 1, § 10; *Iowa*, Const. art. 1, § 16; *Florida*, Thompson's Dig. p. 490, ch. 2; *Louisiana*, Const. art. 6, § 2; *Mississippi*, Const. art. 7, § 3. In *Georgia* (Penal Code, 1833, div. 3, § 2, Prince's Dig. p. 622; Cobb's Dig. Vol. 2, p. 782), the crime is defined in the same manner, but the proof is modified, as will be seen in its proper place.

but in a few of the States, both the crime and the requisite proof are described with other qualifications. Thus, in *New York*, treason is declared to consist, 1. In levying war against the people of this State, within the State; 2. In a combination of two or more persons, by force, to usurp the government of the State or to overturn the same, evidenced by a forcible attempt, made within the State, to accomplish such purpose; and, 3. In adhering to the enemies of this State, while separately engaged in war with a foreign enemy, in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort, in this State or elsewhere.[1] A similar division and description of the offence is found in the statute of *Mississippi*.[2] In *Virginia*, it is enacted, that "Treason shall consist only in levying war against the State, or adhering to its enemies, giving them aid and comfort, or establishing, without authority of the legislature, any government within its limits, separate from the existing government, or holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it, or resisting the execution of the laws, under color of its authority." And the same amount of proof is required, as in treason against the United States.[3] In *New Jersey*, treason is limited to levying war against the State and adhering to its enemies, giving them aid and comfort, by advice or intelligence, by furnishing them money, provisions, or munitions of war, by treacherously surrendering any fortress, troops, citizen, or public vessel, or otherwise.[4] The statute of *Pennsylvania* on this subject, enacted during the Revolution, renders it treason in any person resident within the State and under the protection of its laws, to take a commission under any public enemy; or to levy war against the State or its government; or to aid or assist any enemies, at open war with the State or United States, by joining their armies, enlisting or procuring enlistments for that purpose, or furnishing them with arms or other articles for their aid or comfort, or carrying on a traitorous correspondence with them, or forming, or being concerned in forming, any combination to betray the State or country into their hands, or giving or sending intelligence to them for that purpose.[5] In *South Carolina* it has been

[1] *New York*, Rev. Stat. Vol. 2, p. 746 (3d ed.).

[2] *Mississippi*, How. & Hutchins. Dig. 1840, p. 691, Penit. Code, tit. 2, § 2.

[3] *Virginia*, Rev. Stat. 1849, ch. 190, § 1.

[4] *New Jersey*, Rev. Stat. 1846, tit. 8, ch. 1, § 1, p. 257.

[5] *Pennsylvania*, Stat. Feb. 11, 1776, Dunlop's Dig. ch. 64, § 3, p. 120; Respublica *v.* Carlisle, 1 Dall. 35.

thought doubtful whether any law concerning treason, anterior to their Constitution of 1790, could be of force since that time ;[1] and in several of the States the opinion has been entertained, to some extent that treason, by levying war against a single State, was necessarily an offence against the United States, and therefore cognizable as such by none but the national tribunals.[2] But as war may be levied against a single State by an open and armed opposition to its laws, without any intention of subverting its government, the better opinion is that the State tribunals may well take cognizance of treasons of this description, and of any others directly affecting the particular State alone.[3]

§ 238. *Misprision of treason* against the United States, is when any person, having knowledge of the commission of any treason, shall conceal, and not, as soon as may be, disclose the same to the President of the United States, or some one of the Judges thereof, or to the Governor of a particular State, or some one of the Judges or Justices thereof.[4] This offence is defined substantially in the same manner in the laws of several of the States; but these statutes are all merely recognitions of the doctrine of the common law, which is prevalent in the whole country.[5]

§ 239. In indictments for treason, it is material to allege that the party *owed allegiance and fidelity* to the State against which the treason was committed; and this allegation seems equally material in a charge of misprision of treason. It may be proved by evidence that the party was by birth a citizen of the State or of the United States, as the case may be; or that, though an alien, he was resident here, with his family and effects. And if he were gone abroad, leaving his family and effects here, his allegiance to the government is still due for the protection they receive.[6]

[1] See S. Car. Statntes at Large, Vol. 2, pp. 717, 747, notes by Dr. Cooper, the authorized editor. He adds: "I know of no treason law in this State, as yet." But in a subsequent volume is found a statute making it treason for any one to be concerned with slaves in an insurrection, or to incite them to insurrection, or to give them aid and comfort therein. Id. Vol. 5, p. 503; Stat. Dec. 19, 1805, No. 1860.

[2] See Livingston's Penal Code for Louisiana, Introductory Report, p. 148; 4 Am. Law Mag. 318–350; Wharton's Am. Crim. Law, p. 785; Walker's Introd. pp. 151, 458.

[3] Rawle on the Constitution, pp. 142, 143; Sergeant on Constit. Law, p. 382; 1 Kent, Comm. 442, note (7th ed.); Whart. Am. Crim. Law, 786; Dorr's Trial, Id. 786–790; The People *v.* Lynch, 11 Johns. 549.

[4] Crimes Act. April 30, 1790, § 2.

[5] 4 Bl. Comm. 119, 120; 1 Hale, P. C. 372; Bracton, Lib. 3, De Corona, cap. 3, fol. 118, b. In *Florida*, the act of endeavoring to join the enemies of the State, or persuading others to do so, or to aid and comfort them, is declared to be a misprision of treason, as well as knowing of the same, or knowing of any treason and concealing it. Thomps. Dig. p. 222.

[6] 2 Kent, Comm. Lect. 25, pp. 1–15, 26 [39–53, 63, 64]; 1 East, P. C. 52,53; 1 Hale, P. C. 59, 62, 92; Vattel, b. 2, §§ 101, 102.

§ 240. In every indictment for this crime, *an overt act also must be alleged and proved;* for it is to the overt act charged, that the prisoner must apply his defence. But it is not necessary, nor is it proper, in laying the overt acts, to state in detail the evidence intended to be given at the trial; it being sufficient if the charge is made with reasonable certainty, so that the prisoner may be apprised of the nature of the offence of which he is accused.[1] Therefore, if writings constitute the overt act, it is sufficient to state the substance of them;[2] or, if they were sent to the enemy for the purpose of giving intelligence, it will suffice simply to charge the prisoner with the overt act of giving and sending intelligence to the enemy.[3]

§ 241. Though the evidence of treason must be *confined to the overt act or acts laid in the indictment*, without proof of which no conviction can be had; yet, for the purpose of proving the *traitorous intention* with which those acts were committed, evidence of other overt acts of treason, not laid in the indictment, is admissible, if there be no prosecution for those acts then pending. And it seems sufficient if such collateral facts be proved by one witness only; for the law requiring two witnesses is limited in its terms to the specific overt act charged; leaving all other facts, such as alienage, intention, &c., to be proved as at common law.[4] But if the overt act charged is not proved by two witnesses, where this is required by law, so as to be submitted to the Jury, all other testimony is irrelevant and must be rejected.[5] Respecting the *intention* of the prisoner, or the *object* or *meaning* of the acts done, we may add, that *he* is not of necessity bound to prove this; but the entire offence must be made out by the government.[6]

§ 242. Where the overt act of *levying war* is alleged to have been an *armed assemblage* against the government for that purpose, this allegation may be proved by evidence of such an assemblage for any warlike object in itself amounting to an actual or constructive levying of war; such as, to prevent the execution of a public law;[7] to compel the repeal of a law, or otherwise to alter the law;

[1] Foster, 194, 220; 4 Cranch, 490; per Marshall, C. J., in Burr's case; 2 Burr's Trial, 400.

[2] Rex *v.* Francia, 6 St. Tr. 58, 73; Rex *v.* Ld. Preston, 4 St. Tr. 411; Rex *v.* Watson, 2 Stark. R. 116, 137, [104, 116–118, ed. 1823]; 3 Eng. Com. L. Rep. 282.

[3] Respublica *v.* Carlisle, 1 Dall. 35.

[4] Layer's case, 16 How. St. Tr. 215; 1 East, P. C. 121–123; United States *v.* Mitchell, 2 Dall. 348. As to the proof of intention, see *supra*, § 14.

[5] United States *v.* Burr, 4 Cranch, 493, 505; 2 Burr's Trial, pp. 428, 443.

[6] Regina *v.* Frost, 9 C. & P. 129; *Supra*, § 17.

[7] Fries's Trial, p. 196.

to pull down all buildings or enclosures of a particular description, or to expel all foreigners, or all the citizens or subjects of a particular country or nation.[1] But if the assemblage appears to have been for objects of a private or local nature, supposed to affect only the parties assembled, or confined to particular individuals or districts, such as, to remove a particular building or enclosure; or to release a particular prisoner, or the like, this evidence will not support this allegation.[2]

[1] Rex *v.* Ld. Geo. Gordon, 2 Doug. 590; Foster, 211–215; 1 Hale, P. C. 132, 153; 1 East, P. C. 72–75.

[2] 1 East, P. C. 75, 76; Foster, 210; 1 Hale, P. C. 131, 133, 149. The term "levying war," in the Constitution of the United States, has been expounded by Mr. Justice Curtis in the following terms: "This settled interpretation is, that the words 'levying war' include not only the act of making war, for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination." "The following elements, therefore, constitute this offence: 1st. A combination, or conspiracy, by which different individuals are united in one common purpose. 2d. This purpose being to prevent the execution of some public law of the United States, by force. 3d. The actual use of force, by such combination, to prevent the execution of such law. It is not enough that the purpose of the combination is to oppose the execution of a law in some particular case, and in that only. If a person against whom process has issued from a Court of the United States, should assemble and arm his friends, forcibly to prevent an arrest, and, in pursuance of such design, resistance should be made by those thus assembled, they would be guilty of a very high crime; but it would not be treason, if their combination had reference solely to that case. But if process of arrest issues under a law of the United States, and individuals assemble forcibly to prevent an arrest under such process, pursuant to a design to prevent any person from being arrested under that law, and pursuant to such intent, force is used by them for that purpose, they are guilty of treason. The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws. Indeed, such a distinction would be found impracticable, if it were attempted. If this crime could not be committed by forcibly resisting one law, how many laws should be thus resisted, to constitute it? Should it be two, or three, or what particular number, short of all? And if all, how easy would it be for the most of treasons to escape punishment, simply by excepting out of the treasonable design, some one law. So that a combination, formed to oppose the execution of a law by force, with the design of acting in any case which may occur and be within the reach of such combination, is a treasonable conspiracy and constitutes one of the elements of this crime. Such a conspiracy may be formed before the individuals assemble to act, and they may come together to act pursuant to it; or, it may be formed when they have assembled, and immediately before they act. The time is not essential. All that is necessary is, that, being assembled, they should act in forcible opposition to a law of the United States, pursuant to a common design to prevent the execution of that law, in any case within their reach. Actual force must be used. But what amounts to the use of force, depends much upon the nature of the enterprise and the circumstances of the case. It is not necessary that there should be any military array, or weapons, nor that any personal injury should be inflicted on the officers of the law. If a hostile army should surround a body of troops of the United States, and the latter should lay down their arms and submit, it cannot be doubted that it would constitute an overt act of levying war, though no shot was fired, or blow struck. The presence of numbers who manifest an intent to use force, if found requisite to obtain their demands, may compel submission to that force which is present and ready to inflict injury, and which may thus be effectually used to oppose the execution of the law. But unfortunately, it will not often be necessary to apply this principle, since actual violence, and even murder, are the natural and almost inseparable attendants of this great crime." 4 Monthly Law Reporter, pp. 413, 414. Thus far the learned Judge has stated the law of this species of treason in precise ac-

§ 243. In the proof of a charge of treason by levying war, it is not necessary to prove that the prisoner was actually present at the perpetration of the overt act charged; it being sufficient to prove that he was *constructively* present on that occasion. The law of *constructive presence* is now well settled. Whenever several persons conspire in a criminal enterprise, which is to be consummated by some principal act, or some decisive stroke, to the accomplishment of which certain other acts or circumstances are directly subordinate or ancillary, though these latter are to be performed at a distance from the principal scene of action, and consist merely in watching and warning of danger, or in having ready the means of instant escape, or the like, the law deems them all virtually present at the commission of the crime, and therefore all alike guilty as principals.[1] On this ground it is, that if war is levied with an organized military force, *vexillis explicatis*, all those who perform the various military parts of prosecuting the war, which must be assigned to different persons, may justly be said to levy war. All that is essential to implicate them is, to prove that they were leagued in the conspiracy, and performed a part in that which constituted the overt act, or was immediately ancillary thereto.[2] But if the personal co-operation of the prisoner in the general enterprise was to be afforded elsewhere, at a great distance, and the acts to be performed by him were distinct overt acts, he cannot be deemed constructively present at any acts, except those to which the part he acted was *directly and immediately* ancillary.[3]

cordance with the views of our greatest Jurists. See United States *v.* Vigol, 2 Dall. 346; United States *v.* Mitchell, Id. 348, 355; *Ex parte* Bollman, 4 Cranch, 75, 126; United States *v.* Burr, 4 Cranch, 481–486; 2 Burr's Trial, 414–420; 3 Story on the Constitution, §§ 1790–1795; 3 Story, Rep. 615. [See also United States *v.* Hanway, 2 Wallace, Jr., 17 L. R. 344, 347.] [* See charge of Judge Sprague, 23 Law Reporter, 705; also, charge of Judge Smalley, Id. 597.]

[1] See Commonwealth *v.* Knapp, 9 Pick. 496; 10 Pick. 477; 1 Hale, P. C. ch. 34, per tot.; *Supra*, tit. Accessory; 4 Cranch, 492, 493.

[2] Burr's case, 4 Cranch, 471–476.

[3] Burr's case, 4 Cranch, 494. "It is manifest, that to hold a party to have been constructively present at an overt act of treason, which treason itself is already expressly defined by law, is a very different thing from creating a new species of treason, by judicial construction; yet these two have sometimes been confounded, and in one instance, by a Jurist of great eminence (see Tucker's Blackstone, Vol. 4, Appendix B.), whose reasoning, however, is sufficiently refuted by the observations of Marshall, C. J., in Burr's trial (4 Cranch, 493–502). Professor Tucker puts the case of a person in Maryland, hearing of Fries's insurrection in Pennsylvania, and lending a horse or money to a person avowedly going to join the insurgents, in order to assist him in his journey; and asks if this would amount to levying war in Pennsylvania, where the lender never was? The answer is furnished by referring to the distinction taken by the Court in Burr's case. The indictment must state the specific overt act of treason. If what was done in Maryland was treasonable in itself, and is so

§ 244. The charge of treason by *adhering to the public enemies, giving them aid and comfort*, may be proved by evidence of any overt acts, stated in the indictment, done with that intent, and tending to that end; such as, joining the enemy; liberating prisoners taken from him; holding a fortress against the State, in order to assist the enemy; furnishing him with provisions, intelligence, or munitions of war; destroying public stores in order to aid him; surrendering a fortress to him; or the like.[1] *Public enemies*, are those who, not owing allegiance to the State, or to the United States, are in open and warlike hostility thereto; whether they act under authority from a foreign State, or merely as voluntary adventurers. And it is sufficient to prove that a state of hostility exists in fact, without proving any formal declaration of war.[2]

§ 245. It is also to be noted, that "in treason, all the *participis criminis* are principals; there are *no accessories* to this crime. Every act, which, in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal."[3]

§ 246. In regard to the *number of witnesses* requisite to convict of treason, it is now universally settled, both in England and in this country, that there must be at least *two witnesses*. This rule was enacted in England in the reign of Edward VI.,[4] and has been

charged, the trial must be had in Maryland, and the application of the doctrine of constructive presence is not required. But if the party was one of the conspirators, and his act constituted a part of the principal overt act of treason perpetrated in Pennsylvania, the State line, it is conceived, would interpose no objection to his being legally *particeps criminis;* any more than though being in Maryland, he shot an officer dead who was on the Pennsylvania side of the line. If a citizen of Newport, in Rhode Island, stationing himself at Seekonk, in Massachusetts, while Dorr's troop of insurgents were storming the arsenal in Providence, had supplied them with arms and ammunition for that purpose, could he have escaped conviction as a traitor in the county of Providence, on the ground that he was never personally in that county? Yet here would be no constructive treason. The crime would be treason by levying war. The overt act would be storming the arsenal in Providence; in which the prisoner bore an essential, though a subordinate part. And if he bore such part, it surely can make no difference where he stood while he performed it." 4 Monthly Law Rep. p. 416, 417.

[1] Foster, 22, 197, 217, 219, 220; 1 East, P. C. 66, 78, 79; 1 Hale, P. C. 146, 164; 3 Inst. 10, 11; United States *v.* Hodges, 2 Wheeler, Cr. C. 477; Rex *v.* Ld. Preston, 12 How. St. Tr. 409; Rex *v.* Vaughan, 13 How. St. Tr. 486; Rex *v.* Gregg, 14 How. St. Tr. 1371; Rex. *v.* Hensey, 1 Burr. 642; Rex *v.* Stone, 6 Tr. 527.

[2] 1 Hale, P. C. 163, 164; Foster, 219; 1 East, P. C. 77, 78; 4 Bl. Comm. 82, 83.

[3] Fries's Trial, p. 198, per Chase, J. No exception was taken to this doctrine, in that case, though the prisoner was defended by the ablest counsel of that day, and the case was one of deep political interest. The same law is laid down by Ld. Hale, as "agreed of all hands"; 1 Hale, P. C. 233. Ld. Coke calls it "a sure rule in law." 3 Inst. 138. And see Throgmorton's case, 1 Dyer, 98 b, pl. 56; Foster, 213; *Supra.* tit. ACCESSORIES, per tot.; 1 East, P. C. 93, 94. The application of this doctrine, however, to cases under the Constitution of the United States, was questioned by Marshall, C. J., in Burr's case, 4 Cranch, 496 – 502.

[4] Stat. 1, Ed. 6, ch. 12; and 5 & 6, Ed. 6, ch. 11.

adopted in all the States of the Union. In the interpretation of the early English statutes, it was held sufficient if one witness testified to one overt act, and another to another, of the *same treason;*[1] and this construction was afterwards adopted by act of Parliament.[2] The same construction is understood to be the rule of evidence in trials for treason against those several States of the Union which have not made a different provision. But the Constitution of the United States, as we have seen, provides that "No person shall be convicted of treason, unless on the testimony of two witnesses to *the same overt act*, or on confession in open Court"; and this provision has been adopted by the constitutions and statutes of several of the individual States.[3] In these States, therefore, and in trials for treason against the general government, in the Courts of the United States, both the witnesses must speak not only to the same species of treason, but the same overt act charged in the indictment. But whether, where the overt act, constituting the treason, is to be proved by evidence of several distinct facts, which, separately taken, may each appear innocent, but which in the aggregate are treasonable, it be necessary under the national Constitution, that each of the two witnesses should be able to testify to all the facts of which the overt act of treason is composed, is a point not known to have been expressly decided.

§ 247. The *proof of misprision of treason* is regulated by the rules

[1] This construction was settled upon the trial of Ld. Stafford, who was indicted for compassing the death of the king. "And upon this occasion my Lord Chancellor, in the Lords' House, was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar, he believed; and it was this, — anciently, all or most of the Judges were churchmen and ecclesiastical persons, and, by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason." T. Raym. 408.

[2] Stat. 7 W. 3, ch. 3, § 2; which enacts, that no person shall be indicted, tried, or attainted of treason or misprision of treason, "but upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other of them to another overt act of the same treason"; or upon his confession, &c. The same rule in regard to treason only, has been enacted in *New York*. Rev. Stat. Vol. 2, p. 820, § 15.

[3] See *supra*, § 237. In *Illinois*, it is merely required that the party be "duly convicted of open deed, by two or more witnesses." Rev. Stat. 1845, ch. 30, § 20. In *Florida*, and in *Connecticut*, the testimony of two witnesses, "*or that which is equivalent thereto*," is made necessary to *every* capital conviction. Thompson's Dig. p. 258, § 159; Connecticut Rev. Sat. 1849, tit. 6, § 159. In *Georgia*, it is required that the party accused of treason be "legally convicted of open deed, by two or more witnesses, *or other competent and credible testimony*," &c. Penal Code, 1833, Div. 3, § 2; Prince's Dig. p. 162; 2 Cobb's Dig. p. 782. In *Pennsylvania*, the language of the law is, that he "be thereof legally convicted by the evidence of two sufficient witnesses," &c. Stat. Feb. 11, 1777; Dunlop's Dig. p. 120.

of the Common Law, as in other cases of crime, in all those States where it has not been changed by statute.[1]

§ 248. It may here be added, that though one witness may be sufficient to prove a *confession of treason*, where such confession is offered in evidence merely as *corroborative* of other testimony in the cause; yet, under the law of the United States, and of those States which have adopted a similar rule, the prisoner cannot be convicted upon the evidence of his confession alone, unless it is made in open Court.[2]

[1] The only exception now known to the author, is the provision in *Maine*, Rev. Sat. 1840, ch. 153, § 4; which requires the same amount of evidence in proof of misprision of treason, which is required by Stat. 7 W. 3, ch. 3, quoted *supra*, § 246, in cases of treason. In *Pennsylvania*, persons charged with treason or misprision of treason, may be proceeded against for a misdemeanor, and convicted on the testimony of one witness alone. Stat. March 8, 1780; Dunlop's Digest, ch. 69, p. 127.

[2] *Supra*, § 237; *Ante*, Vol. 1, § 255. And see 1 East, P. C. 131–135; Respublica *v.* Roberts, 1 Dall. 39; Respublica *v.* McCarty, 2 Id. 86.

# PART VI.

OF

# EVIDENCE IN PROCEEDINGS

IN

# EQUITY.

# PART VI.

## OF EVIDENCE IN PROCEEDINGS IN EQUITY.

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## CHAPTER I.

### PRELIMINARY OBSERVATIONS.

[* § 249. Law of evidence peculiar to equity proceedings treated of in Part VI.
250. How rules of evidence in equity differ from those at law, in examination of defendant.
251. In the manner of taking the testimony of the witnesses.
252. Objections to this manner.
253. Burden of proof, how adjusted in treating fiduciary and confidential relations.
254. Quantity of evidence requisite to establish fraud or trust, less than at law.
254 *a*, 254 *b*. This proposition further discussed.
255. In other respects rules of evidence at law and equity the same.
256. Course of proceeding in national tribunals of the United States.
257. In some of the States where courts of law have equity jurisdiction.
258. Practice in Connecticut and some other States.
259. Oral testimony admitted in large part of the United States.
260. Party entitled to trial by jury of questions of fact in equity in some States.
261. Object and effect of a trial by jury in chancery proceedings to inform the conscience of the court.
262. Chancellor cannot disregard finding of the jury, where the constitution secures the right to such trial.
263. Expositions of such constitutional provision by Supreme Court.
264. Provisions in State constitutions on this subject.
265. Statute provisions for securing trial by jury.
266. Duty of court to order trial by jury considered.
267. Different forms of chancery proceedings in United States.

§ 249. In the first volume of this work, those general rules of Evidence have been considered, which are recognized in all the tribunals of the country, however various their modes of adminis-

tering justice; including, of course, the general principles and rules of this branch of the law, as administered in Courts of Equity. Those principles and rules, therefore, will not here be repeated; it being proposed in this place merely to treat of matters in the Law of Evidence peculiar to proceedings in Courts of Equity, and in other Courts which employ forms of proceedings, substantially similar to those.

§ 250. The rules of Evidence, as to the matter of fact, as Lord Hardwicke long since remarked, are generally the same in Equity as at law. It is only in particular cases that they differ; and these are either the investigation of frauds or trusts, or cases growing out of the peculiar nature of the proceedings.[1] These proceedings, as on a former occasion has been observed,[2] are exceedingly diverse from those at Common Law, both in the forms of conducting the allegations of the parties and in the means by which evidence is obtained. For, though at law the defendant may, by a plea of the general issue, put the plaintiff upon the proof of every material fact he has alleged, and is not bound to make a specific answer to any; yet, in proceedings by bill in Equity, the plaintiff may require the defendant to *answer particularly, and upon oath, to every material allegation, well pleaded, in the bill;* and the defendant also, by a cross-bill, may elicit from the plaintiff a similar answer, under the same sanction; each party being generally permitted to search the conscience of the other, for the discovery of any facts material to his side of the controversy. The object of this stringent course of proceeding is to furnish an admission of the case made by the bill, either in aid of proof, or to supply the want of it, and to avoid expense.[3] The plaintiff having thus appealed to the conscience of the defendant for the truth of what he has alleged, it results, as a reasonable and just consequence, that the answer of the defendant, under oath, so far as it is responsive to the bill, is evidence in the cause, in proof of the facts of which the bill seeks a disclosure; and being so, it is conclusive evidence in the defendant's own favor, unless, as will hereafter be seen, the plaintiff can overcome its force, either by the testimony of two opposing witnesses, or of one witness, corroborated by other facts and circumstances sufficient to give it a

[1] Manning *v.* Lechmere, 1 Atk. 453; Glynn *v.* Bank of England, 2 Ves. 41; Man *v.* Ward, 2 Atk. 228. And see Dwight *v.* Pomeroy, 17 Mass. 303, 325; Reed *v.* Clark, 4 Monr. 20; Baugh *v.* Ramsey, Id. 157.

[2] *Ante*, Vol. 2, § 4.

[3] Wigram on Discovery, Introd. § 2.

greater weight than the answer.[1] The obvious utility of this practice of examining the defendant himself has led to its adoption, to some extent, in several of the United States, in suits at Common Law, as will be subsequently shown.

§ 251. Another material diversity between proceedings in Equity and at Common Law, affecting the rules of evidence, is in *the manner of taking the testimony of witnesses;* the latter requiring the examination to be open and *vivâ voce;* while in Equity it is taken secretly, and in writing.[2] The reason of this diversity is said to be found in the difference of the objects sought to be attained, and in the result of the controversy. At Common Law, the Jurors are not to decide on the general merits of the whole case, nor to elicit a conclusion of law from a series of facts laid before them; but are merely to find the truth of the particular issue of fact submitted to their decision. In order to do this, it is important that the witnesses should be examined and cross-examined publicly, in their presence,[3] that the entire mass of evidence should be commented on by advocates, and that it be summed up to them, with proper instructions, by the Court. After this, the Court renders the proper judgment upon the whole case, as it appears both in law and in fact upon the record. The evidence is not judicially recorded; for its results are found in the verdict; and there is no occasion to preserve it for the information of any appellate Court, the Common Law not permitting any appeal, in the modern sense of the term, from a lower to a higher tribunal. But in Equity, the determination of the particular issues of fact is not the principal object, though essential to its final attainment; but the object is, first, to obtain and preserve a sworn detail of facts, on which the Court may, upon deliberation, adjudge the equities, and, secondly, to preserve it in an authentic record, for the use of an higher tribunal, should the cause be carried thither

[1] *Ante,* Vol. 1, § 260; 2 Story, Eq. Jur. § 1528; Gresley on Evid. in Equity, p. 4; Pember *v.* Mathers, 1 Bro. Ch. R. 52, and cases in note by Perkins; Evans *v.* Bicknell, 6 Ves. 183; [*Post,* §§ 277–290.] [* Tobey *v.* Leonards, 2 Wallace, U. S. Rep. 423; Parker *v.* Phetteplace, 1 Ib. 689. See Lancaster *v.* Ward, 1 Overton, Tenn. R. 430.]

[2] In the American practice, in those States whose modes of proceeding most nearly approach the old chancery forms, the interrogatories to witnesses are ordinarily filed in the clerk's office, and copies are served on the adverse party by a certain day, in order that he may prepare and file his cross-interrogatories; and the caption to the interrogatories usually states the names of the witnesses, if known. The parties, therefore, can generally form probable conjectures of the drift of the evidence to be taken, though its precise import may remain unknown until the publication of the depositions. [See *post,* § 259, note.]

[3] The student will hardly need to be reminded that the use of depositions in trials at Common Law, is only authorized by statutes.

by appeal;—a proceeding, though unknown to the Common Law, yet of familiar use in Courts of Equity, Admiralty, and Ecclesiastical jurisdiction.[1]

§ 252. This mode of taking testimony in Equity is *open to two objections:* first, that its protracted nature, by interrogatories filed from time to time,[2] enables the party to discover any defects in his proof, and furnishes the temptation to remedy them by false testimony; and secondly, that its secrecy may not only afford facilities to perjury, but may lead to imperfect statements of the truth, especially where the party has so artfully framed his interrogatories, as to elicit testimony only as to the part of the transaction most favorable to himself. The former of these objections is intended to be obviated not only by the entire secrecy with which the testimony is taken, no person being present except the examining officer and the witness, but also by the rule, that, until all the testimony is taken, and the depositions are opened and given out, or, as it is termed, until publication is passed, neither party is permitted to know what has been testified; and that after publication, no witness can be examined without special leave of the Court. The latter objection is more difficult of remedy, but it is in a great measure obviated by the rule, hereafter to be expounded, that in order to give weight to evidence, the facts which it is intended to establish must previously have been alleged in the pleadings.[3]

§ 253. A further diversity between the course of Courts of Equity and Courts of Common Law, will be found in the adjustment of the *burden of proof*, in their treatment of *fiduciary and confidential relations* between the parties. If, for example, an

[1] Adams's Doctr. of Equity, pp. 365, 366.

[2] It was the ancient practice, when testimony was to be taken under a commission, to exhibit all the interrogatories and cross-interrogatories before the issuing of the commission; after which no others could be filed; the commissioners being sworn to examine the witnesses upon the interrogatories "*now* produced and left with you." But in the Orders in Chancery in 1845, Reg. 104, the word "*now*" was omitted from the oath; and even prior to that period, it was "the practice in country causes in England, to *feed* the commissioners from time to time with interrogatories for the examination of witnesses, as they can be presented either for original or cross-examination, until the commissioners find that the supply of witnesses is exhausted." Campbell *v.* Scougal, 19 Ves. 554. Whether new interrogatories can now be exhibited before a commissioner, under the English rule, is doubted. 2 Dan. Ch. Pr. 1053, 1085. [* 3d Amer. Ed. 916, 933.] But the practice in the Courts of the United States, and, as far as is known to the author, in the State Courts also, is to permit parties to file new interrogatories to different witnesses, from time to time, and to take out new commissions, as often as they choose, within the period allowed for taking testimony. Keene *v.* Meade, 3 Peters, 1, 10; 1 Hoffm. Ch. Pr. 476.

[3] Adams's Doctr. of Eq. p. 367.

action at law is brought upon the bond of a client, given to his attorney, it will ordinarily be sufficient for the plaintiff to produce the bond and prove its execution; the bond being held, at law, conclusively to import a valuable and adequate consideration. But in a Court of Equity, in taking an account of the pecuniary transactions between an attorney and his client, the production of a bond, given by the latter to the former, will not be deemed sufficient *primâ facie* evidence of a debt to that amount, but the burden of proof will still be on the attorney, to prove an actual payment of the entire consideration for which the bond was given.[1] The great principle by which Courts of Equity are governed in such cases, is this, that he who bargains in matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.[2] This rule, in its principle, applies equally to parents, guardians, trustees, pastors, medical advisers, and all others, standing in confidential relations with those with whom they treat; the burden of proof being devolved in Equity on such persons, to establish affirmatively the perfect fairness, adequacy, and equity of their respective claims.[3]

[*And where the solicitor becomes the purchaser of an estate of his client, the burden of sustaining it, at least within twenty

[1] Jones *v.* Thomas, 2 Y. & C. 498; Lewes *v.* Morgan, 3 Y. & J. 230. And see 1 Story, Eq. Jur. §§ 309–314.

[2] Gibson *v.* Jeyes, 6 Ves. 278, per Ld. Eldon.

[3] Ibid. And see 1 Story, Eq. Jur. §§ 311–314, and cases there cited; Hatch *v.* Hatch, 9 Ves. 292, 296, 297; 4 Desaus. 681; Huguenin *v.* Baseley, 14 Ves. 273; Thompson *v.* Heffernen, 4 Dru. & War. 285; Popham *v.* Brooke, 5 Russ. 8; Dent *v.* Bennett, 2 Keen, 539; Adams's Doctr. of Eq. pp. 184, 185. [* Corley *v.* Lord Stafford, 1 De Gex & Jones, 258; Hobday *v.* Peters, 6 Jur. N. S. 794; Cowdry *v.* Day, 5 Jur. N. S. 1199.] [For cases touching the relations of *attorney and client*, see Montesquieu *v.* Sandys, 18 Ves. 313; Edwards *v.* Meyrick, 2 Hare, 60; Carter *v.* Palman, 8 Cl. & Fin. 657, 706; Stockton *v.* Ford, 11 How. U. S. 232; Poillon *v.* Martin, 1 Sandf. Ch. 569; Howel *v.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640; Hockenbury *v.* Carlisle, 5 Watts & Serg. 350; Mott *v.* Harrington, 12 Verm. 199; Jones *v.* Thomas, 2 Younge & Coll. 498; Champion *v.* Rigby, 1 Russ. & Mylne, 539: *of physician and patient*, Dent *v.* Bennett, 2 Keen, R. 539; S. C. 4 Mylne & Craig, 269, 276, 277; Billing *v.* Southee, 10 Eng. Law and Eq. R. 37; Whitehorn *v.* Hines, 1 Munf. 559; Crispell *v.* Dubois, 4 Barbour, 393; but see Pratt *v.* Barker, 1 Sim. R. 1; Gozzet *v.* Lane, 12 Mo. 215: *of guardian and ward*, Wedderburn *v.* Wedderburn, 4 Mylne & Craig, 41; Hylton *v.* Hylton, 2 Ves. 548, 549; Hatch *v.* Hatch, 9 Ib. 297; Wright *v.* Proud, 13 Ib. 136; Breed *v.* Pratt, 18 Pick. 117; Bostwick *v.* Atkins, 3 Comst. 53; Johnson *v.* Johnson, 5 Ala. 90; Wright *v.* Arnold, 14 B. Monroe, 638; Sullivan *v.* Blackwell, 28 Mis. 737: *of trustee and cestui que trust*, Hatch *v.* Hatch, 9 Ves. 292, 296; Bulkley *v.* Wilford, 2 Cl. & Fin. 177; Farnum *v.* Brooks, 9 Pick. 233: *of parent and child*, Houghton *v.* Houghton, 15 Beav. 278; Baker *v.* Bradley, 35 Eng. L. & Eq. 449; Slocum *v.* Marshall, 2 Wash. C. C. 397; Jenkins *v.* Pye, 12 Peters, 249; Taylor *v.* Taylor, 8 How. U. S. 183; and so in the case of a voluntary gift to one who has put himself *in loco parentis* towards the donor. Archer *v.* Hudson, 7 Beav. 551: *of other family relations, as brother and sister*, Sears *v.* Shafer, 2 Selden, 268; Hewit *v.* Crane, 2 Halst. Ch. R. 159, 631; and Boneg *v.* Hollingsworth, 23 Ala. 690.]

years, is upon him; and it has been said by eminent judges, that the same weight ought not to be given to the lapse of time, during the continuance of the relation of attorney and client, as in other cases.[1] Where the solicitor proposes to take any contract from his client for compensation, beyond what the law provides, or in a different form more advantageous to himself, it is his "bounden duty" to inform his client, that the law allows no such charge.[2] And in a later case,[3] between attorney and client, it was held in the Court of Chancery Appeal, upon argument and very extended consideration, that it is incumbent upon persons who receive benefits from those towards whom they stand in confidential relation, to show that such persons had competent and independent advice, and this rule is not affected by the age or capacity of the persons conferring the benefits, or the nature of the benefits conferred. But this will not extend to interfere with mere trifling gifts, without proof, not only of influence resulting from the relation, but of *mala fides*, or of undue and unfair exercise of the influence.

This question is discussed in a late case[4] by a judge of great learning and experience, with his accustomed fearlessness and point. It is here declared, that all securities taken by the solicitor are presumptively void, and the onus is thrown upon the creditor of showing them fair and upon sufficient consideration; and that they will be allowed to stand only for the actual indebtedness, as found by the Court. The language of Judge Sharswood, in his lecture on professional ethics, is here adopted[5]: "When the relation of solicitor and client exists, and a security is taken by the solicitor from his client, the presumption is that the transaction is unfair, and the onus of proving its fairness is upon the solicitor." But the same rule will not always apply to testamentary disposition in favor of an attorney by his client, which might be applicable to such a gift, *inter vivos*.[6]]

§ 254. Again, there is said to be a diversity in *the amount or quantity of evidence* which those Courts respectively require, in order so to establish allegations of *fraud or trust* as to entitle the party to a verdict or a decree. In both Courts the rule is well

[1] [* Gresley *v.* Mousley, 5 Jur. N. S. 583.

[2] Lyddon *v.* Moss, 5 Jur. N. S. 637; Morgan *v.* Higgins, Id. 236.

[3] Rhodes *v.* Bate, 11 Jur. N. S. 803; S. C. 12 Id. 178.

[4] Brown *v.* Bulkley, 1 McCarter, 451, by Green, Chancellor.

[5] 2 Sharswood, Prof. Ethics.

[6] Hindson *v.* Weatherell, 5 De Gex, M. & G. 301.]

settled, that fraud is never to be presumed, but must always be established by proofs.[1] But Courts of Equity, it is said, will act upon circumstances, as indicating fraud, which Courts of Law would not deem satisfactory proofs; or, in other words, will grant relief upon the ground of fraud, established by presumptive evidence, which evidence Courts of Law would not always deem sufficient to justify a verdict.[2] Examples of this class are found where Courts of Equity will order the delivery up of *post obit* and marriage-brocage bonds, and composition-bonds between a bankrupt and a preferred creditor, to induce him to sign the certificate; these being presumed fraudulent.[3]

[*§ 254 *a*. It is not safe to undertake to define what degree or kind of proof will justify a Court of Equity in granting relief against fraud. For the proof must satisfy the conscience of the Chancellor, or Court. And no man would deem it prudent to attempt to define the extent of that indispensable qualification in a Judge, or a Court,—the requisite amount or quality of his sense of justice. And men's views in weighing evidence, are as various as their forms or their features. All we can say is, that the proof must be sufficient to satisfy the mind of the triers whether Court or Jury, of the existence of fraud. And to do this, it must be sufficient to overcome the natural presumption of honesty and fair dealing. And that is undoubtedly one of considerable force. Hence we do not expect Courts, and we do not advise Juries to find fraud, except upon reasonably satisfactory evidence. And we are by no means certain, that Juries are more reluctant to act, in such cases, from circumstances, than Judges. We should incline to the contrary opinion. Hence, we could not subscribe fully to the opinion that Courts of Equity will find fraud upon any less proof, or any different proof, from what a Jury will require. We think not. A Jury is, in general, we believe the better, the fairer, and more competent tribunal to investigate a question of fraud, depending upon circumstances. And besides, if we admit that

[1] Such is the rule of the Roman Civil Law. *Dolum ex indiciis perspicuis probari convenit.* Cod. Lib. 2, tit. 21, l. 6. Or, as the commentators expound it, *indiciis claris et manifestis.* Mascard. De Prob. Vol. 2, Concl. 531. Menoch. de Præsumpt. lib. 4; Præsumpt. 12, n. 2. Mascardus, in commenting on the rule, *Dolus regulariter non præsumitur*, states a large number of exceptions to the rule; but, in truth, they are only cases in which fraud is indirectly proved, being deduced, as an inference of fact, from other facts proved in the case, as is ordinarily done by Juries, in trials at law. Mascard. De Prob. Vol. 2, Concl. 532. The indicia of fraud which he there enumerates deserve the attention of the student.

[2] 1 Story, Eq. Jur. §§ 190–193, and cases there cited.

[3] Chesterfield *v.* Janssen, 1 Atk. 301, 352; Fullager *v.* Clark, 18 Ves. 481, 483.

there exists in Courts of Chancery, a capacity, or right, or duty, or disposition, to find fraud, upon less proof, or different proof, from that which is required in Courts of Law, we at once establish a ground of preference between the two jurisdictions, which was never before claimed, and one of a very invidious character in its practical operation. We trust, then, that no one will be drawn into the adoption of any such view upon the subject. We only desire to caution the inexperienced against setting out with any such view, since the general course of opinion and practice is now decidedly in the opposite direction. It is very common now, in Courts of Equity, to send issues of this character into a Court of Law, to be there tried by a Jury. And in the English Courts of Equity they are sometimes tried by a Jury summoned into the Court of Chancery.[1]

§ 254 *b*. The extent of responsibility for a false representation is thus defined in a recent case.[2] Every man must be held responsible for the consequences of such an act, upon which any one acts, and so acting suffers loss or injury, provided it appears that the representation was made with the direct intent that it should be so acted upon, and in the manner which occasions the injury or loss, and where such injury or loss is the direct and immediate consequence of the representation so made.[3]]

§ 255. These diversities in the course of proceeding appear to have been the cause of all the modifications which the rules of evidence, as they exist at Common Law, have undergone in the Court of Chancery in England; the law of evidence, as administered in the Courts of Common Law and of Equity, being in other respects generally the same.

§ 256. In the national tribunals of the United States, where the jurisdiction, both at Law and in Equity, is vested in the same Courts, the course of proceeding is nearly the same, in its main features, as it was in the year 1841, in the High Court of Chancery in England; many of whose Orders of that year were adopted in the Rules of Practice ordained by the Supreme Court in 1842;[4] with a general reference to the then existing English practice in Chancery, as furnishing just analogies for the regulation of the practice in the Courts of the United States, in all cases not otherwise provided for.[5] The same general course of practice is

[1] [* *Post*, § 261.
[2] Barry *v.* Croskey, 2 Johns. & H. 21.
[3] Collins *v.* Cave, 6 H. & N. 131.]
[4] Reg. Gen. Sup. Court, U. S., 1 How. S. C. R. p. xli.–lxx.
[5] Idem. p. lxix. Reg. xc. The course

adopted in several of the individual States, which still retain a separate Court of Chancery, distinct from the Courts of Common Law. Such is the case in the States of New Jersey, Delaware, Tennessee, South Carolina, Mississippi, and Alabama.[1] In these States, therefore, at least, as well as in the national tribunals, the rules of evidence, peculiar to proceedings in Chancery, may be supposed to be generally recognized and observed; and all these rules it is proposed, for that reason, to state and explain; especially, as many or all of them may be applicable, to some extent, and in various degrees, in the practice of the other States.

§ 257. But in all the States, except those above named, the jurisdiction in Equity is vested in the Courts of Common Law; and in many of these, the course of proceeding, in several important particulars, has been so materially changed, that it is hardly possible to construct a treatise on Evidence in Equity, equally applicable or useful in them all. Thus, in the States of New York, Indiana, Georgia, Louisiana, Texas, and California, there is no distinction in the forms of remedy or mode of trial, in civil cases of any description, whether cognizable in other States, in Courts of Equity or of Common Law; but every suit is prosecuted and defended by one uniform mode of petition and answer, to which no oath is required.[2] It is obvious, therefore, that in these States,

of Chancery practice in England has recently undergone a total change, by the statute of 15 & 16 Vict. c. 86, and the new Orders thereupon made; greatly simplifying and improving the proceedings. See note, at the end of this chapter.

[1] The office of Chancellor still exists in *Maryland*, but, by the Constitution, as revised and adopted in 1851, it is to cease in two years from that time. See art. 4, § 23. In *Mississippi*, the Constitution establishes a Superior Court of Chancery, but authorizes the Legislature to give to the Circuit Courts of each county Equity jurisdiction, in cases where the value in controversy does not exceed five hundred dollars. Art. 4, § 16 [By an amendment to the constitution of Mississippi, the Superior and Vice Chancery Courts have been abolished, and their jurisdiction transferred to the Circuit Courts.]

[2] The Judiciary Act of Congress (1789, ch. 20, § 34, Vol. 1, p. 92), provides that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at Common Law, in the Courts of the United States, in cases where they apply. This provision is held to include those statutes of the several States which prescribe rules of evidence in civil cases, in trials, *at Common Law*. McNiel *v.* Holbrook, 12 Pet. 84, 89. But it has been decided, that the adoption of State practice must not be understood as confounding the principles of Law and Equity; that the distinction between Law and Equity is established by the national Constitution; and that, therefore, though a party, seeking to enforce a title or claim at Law in the Courts of the United States, may proceed according to the forms of practice adopted in the State where the remedy is pursued; yet, if the claim is an equitable one, he must proceed according to the rules which the Supreme Court of the United States has prescribed for the regulation of proceedings in Equity; notwithstanding the State laws have abolished the distinction of forms of proceeding at Law and in Equity, and have established one uniform and peculiar mode of remedy for all cases. Bennett *v.* Butterworth, 11 How. S. C. R. 669. And see Livingston *v.* Story, 9 Pet. 632; Gaines *v.* Relf, 15 Pet. 9.

that part of the law of evidence which relates to the effect of the defendant's answer as *evidence* in the cause, has but little force, except so far as it may contain voluntary admissions of fact against himself.[1]

§ 258. In all the States not already named, the proceeding in Equity is understood to be by bill and answer, according to the usual practice in Chancery; though subject to some modifications. Thus, in Connecticut, though the complaint is by bill, the defence is either by demurrer, or by a plea of general denial of the plaintiff's complaint, and this without oath; no oath being required of the defendant, except to his answer to a bill of discovery;[2] or, by a hearing of the bill, without plea, the defendant being permitted at the hearing to prove any matter of defence.

§ 259. In many other States it is either expressly enacted, or implied from existing enactments, and therefore always permitted, that the trials of fact, in Chancery cases, shall or may be by witnesses orally examined in Court, or by depositions, taken in the same manner and for the same causes as at law.[3] By force of these provisions, therefore, and this course of practice, all that portion of the law of evidence in Equity which relates to the mode of taking testimony, and requires it to be secret, and by depositions, is rendered obsolete in more than half the territory of the United States.

§ 260. Another and very material inroad upon the regular practice in Chancery is made in those States in which it is the *right* of the party to have a *trial by Jury* of all questions of fact, in cases in Equity, as well as at Law. In the Constitution of the United States, it is provided, that, "In suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved; and no fact, tried by Jury, shall be otherwise re-examined in any Court of the United

[1] In all cases, in the six States above mentioned, and in *New Hampshire*, and in cases in Equity, in *New Jersey*, *Ohio*, *Wisconsin*, *Missouri*, *Mississippi*, and *Arkansas*, provision is made by law by which parties may, under certain regulations, examine each other as witnesses in the cause, thus superseding, to a great extent, the use of cross-bills. See *ante*, Vol. 1, § 361, note.

[2] Dutton's Dig. pp. 521, 525, 526, 530; Broome *v.* Beers, 6 Conn. 208, 209.

[3] Such, of course, is the practice in those States where but one form of remedy is pursued in all civil cases. See also, *Missouri*, Rev. Stat. 1845, ch. 137, art. 3, §§ 10, 11; *Georgia*, Hotchk. Dig. pp. 583, 584; 1 Cobb's Dig. p. 276; *South Carolina*, 4, Griff. Reg. 830, 870; *Illinois*, Rev. Stat. 1845, ch. 40, § 11; Stat. of 1849, Feb. 12, § 1; *Florida*, Thomp. Dig. p. 461; *Ohio*, Rev. Stat. 1841, ch. 46, § 1; *Michigan*, Rev. Stat. 1846, ch. 90, §§ 49, 50, 51, 57; Broome *v.* Beers, *supra*; *Massachusetts*, Stat. 1852, ch. 312, § 85; [Gen. Stat. 1860, ch. 131, § 60; Pingree *v.* Coffin, 12 Cush. 600;] *Wisconsin*, Const. art. 7, § 19.

States, than according to the rules of the Common Law."[1] This provision has been construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights; and the latter clause of the article has been held to be a substantial and independent clause.[2] This being the case, the question may well arise

[1] Const. United States, Amendments, art. 7.

[2] Parsons *v.* Bedford, 3 Peters, 433. In this case, which was brought up from *Louisiana*, where *all* civil proceedings are by petition and answer, Mr. Justice Story, in delivering the judgment of the Court, expounded the article in question in the following terms: "At the time" (referring to the time of its adoption), "there were no States in the Union, the basis of whose jurisprudence was not essentially that of the Common Law in its widest meaning; and probably no States were contemplated, in which it would not exist. The phrase 'Common Law,' found in this clause, is used in contradistinction to Equity, and Admiralty, and Maritime jurisprudence. The Constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *Law and Equity* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority,' &c., and to all cases of *Admiralty and Maritime jurisdiction*. It is well known that in civil causes, in Courts of Equity and Admiralty, Juries do not intervene, and that Courts of Equity use the trial by Jury only in extraordinary causes, to inform the conscience of the Court. When, therefore, we find that the amendment requires that the right of trial by Jury shall be preserved in suits at Common Law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *Common Law*, they meant what the Constitution denominated in the third article 'Law,' not merely suits which the *Common Law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. Probably there were few, if any, States in the Union, in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by Jury intervened, and the general regulations in other respects were according to the course of the Common Law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided, that 'the trial of issues in fact in the *District Courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by Jury'; and in the twelfth section it is provided, that 'the trial of issues in fact in the *Circuit Courts* shall, in all suits, except those of *equity*, and of *admiralty* and *maritime jurisdiction*, be by Jury'; and again, in the thirteenth section, it is provided, that 'the trial of issues in fact in the *Supreme Court in all actions at law* against citizens of the United States, shall be by Jury.' But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a Jury shall be otherwise re-examinable, in any Court of the United States, than according to the rules of the Common Law.' This is a prohibition to the Courts of the United States to re-examine any facts tried by a Jury in any other manner. The only modes known to the Common Law to re-examine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate Court, for some error of law which intervened in the proceedings. The Judiciary Act of 1798, ch. 20, sec. 17, has given to all the Courts of the United States 'power to grant new trials in cases where there has been a trial by Jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (sec. 22, 24) to this Court to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a Jury. Was it the intention of Congress,

whether the finding of the Jury is not thereby rendered conclusive, in issues out of Chancery.

§ 261. In pursuing this inquiry, it will be expedient to consider, for a moment, the object and effect of a trial by Jury, in proceedings which are strictly according to the ancient course in Chancery. The Chancellor has no power to summon a Jury to attend him; but tries the whole matter in controversy alone.[1] By the theory of Equity proceedings, the Court addresses itself as the conscience of the defendant, and the evidence is adduced to confirm or to refute the answer he may give, upon his oath, or to sustain the allegations in the bill which he is unable to answer, and to enlighten the conscience of the Chancellor as to the degree which in equity he ought to render. He may, if he pleases, assume to himself the determination of every matter of fact suggested by the record; but if the facts are strongly controverted and the evidence is nearly balanced; or if one of the parties has a peculiar right to a public trial, upon the fullest investigation, as, if the will of his ancestor, or his own legitimacy and title as heir-at-law is questioned; or the Chancellor feels a difficulty upon the facts, too great to be removed by the report of the Master or Commissioner; in these, and other cases of the like character, it is the practice in general for the Chancellor to direct an issue to be tried at law, to relieve his own conscience, and to be satisfied, by

by the general language of the Act of 1825, to alter the appellate jurisdiction of this Court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the Jury? to enable it, after trial by Jury, to do that in respect to the Courts of the United States, sitting in Louisiana, which is denied to such Courts sitting in all the other States in the Union? We think not. No general words purporting only to regulate the practice of a particular Court, to conform its modes of proceeding to those prescribed by the State to its own Courts, ought, in our judgment, to receive an interpretation which would create so important an alteration in the laws of the United States, securing the trial by Jury. Especially ought it not to receive such an interpretation, when there is a power given to the inferior Court itself to prevent any discrepancy between the State laws and the laws of the United States; so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate Court to the verdict of the Jury. If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts whether it would not be unconstitutional. No Court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which would involve a violation, however unintentional, of the Constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceeding in the Court below, without changing the effect or conclusiveness of the verdict of the Jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the appellate Court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the Court below is competent to redress it by granting a new trial." See 3 Peters, 446, 449.

[1] 1 Spence on Eq. Jur. 337.

the verdict of a Jury, of the truth or falsehood of the facts in controversy.[1] [*In the English Chancery practice it is allowable to try the facts in a case by a Jury summoned into the Chancery Court, although it is said that this is not generally done, unless both parties desire it, or unless special reasons exist, such as saving expense or delay; still it would, with us, afford the preferable mode of coming at such trial, and save much of the embarrassment of formally drawing up the issue.[2]] The object of a trial at law thus being solely "for the purpose of informing the conscience of the Court," it results that the verdict is not conclusive or binding on the Court; but the Chancellor is still at liberty, if he pleases, to treat it as a mere nullity, and to decide against it, or to send it back to another Jury.[3]

§ 262. It is obvious, however, that this power in the Chancellor to disregard the finding of the Jury cannot exist in any of the United States where the trial of facts, in cases in Equity, is secured

[1] 2 Daniel's Chan. Pract. 1285, 1286, and notes by Perkins [* 3d Amer. Ed. 1085 – 1088]; 1 Hoffm. Ch. Pr. 502, 503; 3 Bl. Comm. 452, 453. [But where there is no conflict of evidence in regard to the material facts, it is the duty of the Court to decide the question without referring it to the Jury. Dougan *v.* Blocher, 24 Penn. State R. (12 Harris), 28. See also Reed *v.* Cline, 9 Gratt. (Va.) 136; Smith *v.* Betty, 11 Ib. 752. As an issue can be directed only where the evidence creates a doubt, and not as a substitute for omitted evidence, the party claiming the issue must first prove his case by regular depositions. Adams's Eq. 376; Clayton *v.* Meadows, 2 Hare, 29; Whitaker *v.* Newman, Ib. 302; Hildreth *v.* Schillenger, 2 Stockt. (N. J.) 196; Fisher *v.* Porch, Ib. 243.] [* "Correct practice requires that specific and distinct issues of fact should be submitted, that the conscience of the Chancellor may be advised by the special verdict, responsive to the issues thus made." Hall *v.* Doran, 6 Clarke (Iowa), 438. See Brewster *v.* Bours, 8 Cal. 501.]

[2] [* Peters *v.* Rule, 5 Jur. N. S. 61. In Black *v.* Lamb, 1 Beasley (N. J.), 123, it is held that "the issue must be tried as a strict issue at law; and the rules of law in regard to evidence, its admissibility, and the weight of it, govern the proceedings, except so far as they have been otherwise regulated by the terms of the issue" out of the Court of Chancery. But an order made by the Court of Chancery that certain evidence shall be read at the trial, is binding on the Judge who conducts the trial, even if the evidence would be excluded by rules of law. See Yingling *v.* Hesson, 16 Md. 112; Ringwalt *v.* Ahl, 36 Penn. St. R. 336.]

[3] Gresley on Eq. Evid. pp. 498, 527, 528; Barnes *v.* Stuart, 1 Y. & C. 139, per Alderson, B. [It rests in the discretion of the Chancellor to award a feigned issue or not; and the verdict of the Jury upon a feigned issue is not conclusive upon the Chancellor. He may have the case tried again and again, and make his decree contrary to such verdicts as are not agreeable to his sense of justice. United States *v.* Samperyac, 1 Hempst. 118; Ward *v.* Hill, 4 Gray, 595; Lansing *v.* Russell, 13 Barb. 510; Holcomb's Executors *v.* New Hope D. B. Co., 1 Stockt. (N. J.) 457; Hoffman *v.* Smith, 1 Md. 475; Sibert *v.* McAvoy, 15 Ill. 106; Williams *v* Bishop, Ib. 553; Lapreese *v.* Falls, 7 Ind. 692; Waterman *v.* Dutton, 5 Wis. 413; Walker *v.* Sedgwick, 5 Cal. 192.] [* And after a Court of Chancery has referred certain issues to a court of law for trial by Jury, and the Jury has decided some of them and been unable to agree upon others, the cause may then be decided by the Court of Chancery upon the whole record, including the report of the trial at law, provided such Court finds itself able to dispose of the cause satisfactorily upon all the evidence before it. Adams *v.* Soule, 33 Vt. 538; Converse *v.* Hartley, 31 Conn. 380. That the evidence introduced on the trial of an issue sent to the Jury was not returned with the verdict to the Equity side of the Court is no sufficient reason why the Court should not enter a decree. Saylor's Appeal, 39 Penn. St. 497.]

to the parties by constitutional or statute law as a matter of right.[1] The law, in granting such right, where it is seasonably asserted by the party, takes away from the Chancellor the authority to determine any question of fact material to the decision, and refers it exclusively to the Jury; the Judge retaining only the power to apply the law of Equity to the facts found by the Jury, in the same manner and to the same extent as at Common Law. It is only where no such right of the party is recognized by law, and where the resort to a Jury is left to the discretion of the Judge, in aid of his own judgment, that he is at liberty to disregard the finding of the Jury, or to determine the facts for himself.

§ 263. That the verdict of the Jury may be conclusive, even in the national tribunals, may be inferred from the exposition which has been given by the Supreme Court to that provision of the Constitution by which the trial by Jury is secured. Thus, in the case in Louisiana, above cited,[2] which was instituted in the District Court of the United States, according to the form of proceeding in the Courts of that State, which is uniform in all cases, the cause was tried by a special Jury, in the ordinary manner, and was taken to the Supreme Court, by writ of error, founded on the refusal of the District Judge to order that the evidence be taken down in writing, according to the course of practice in that State, which is required by law, to enable the appellate Court to exercise the power of granting a new trial, and of reversing the judgment of the inferior Court. But the exception was overruled, on the ground that the error complained of was in a matter of practice only, which could not regularly be assigned for error; and that by the Constitution,[3] "No fact, once tried by a Jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law"; and that no power was given to the Supreme Court, to reverse a judgment for any error in the verdict of the Jury at the trial. It seems, therefore, that where the verdict of the Jury, in the Courts of the United States, cannot be set aside for some cause known in the rules for

[1] [* In Franklin *v.* Greene, 2 Allen, 522; Chapman, J., says, in this Commonwealth, the right of trial by Jury is secured by the Constitution. In suits in Equity the issues do not grow out of the pleadings as in suits at law, but are framed by the Court; yet in framing the issues the Court will have regard to the constitutional provision, and will allow the parties to submit to a Jury all such material facts as are proper to be decided by them; and when a verdict is rendered, and not set aside for good cause shown, it will be regarded as settling the facts conclusively.]

[2] Parsons *v.* Bedford, *supra*. § 260. And see Story on the Constitution, Vol. 3, pp. 626–648, §§ 1754–1766.

[3] Const. U. S. Amendments, art. 7.

granting new trials at Common Law, it is conclusive upon the parties and upon the Court; and this, whether the verdict were rendered upon a feigned issue sent out of Chancery to the Court of Common Law; or upon an issue framed upon a bill in Equity in a Court having jurisdiction both in Equity and at Common Law; or in a civil suit at Common Law.

§ 264. In several of the *individual States*, the right of trial by Jury is secured, either in their constitutions or statutes, in express terms. Thus, in the constitution of Maine, it is provided, that "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by Jury, except in cases where it has heretofore been otherwise practised."[1] A similar provision, in nearly the same words, is found in the constitutions of New Hampshire and Massachusetts;[2] and this has been construed to give the right to a trial of all material facts by the Jury, even in cases in Equity.[3] In the constitution of Vermont,

[1] *Maine*, Const. art. 1, § 20. (Adopted in 1820.)

[2] *New Hampshire*, Const. (1792), Part 1, art. 20; *Massachusetts*. Const. (1780), Part. 1, art. 15. In the constitution of Massachusetts there is an exception of "cases on the high seas, and such as relate to mariners' wages," should "the legislature hereafter find it necessary to alter it."

[3] Such is understood to be the opinion of the learned Judges, in the case of the Charles River Bridge, 7 Pick. 344, 368, 369, though a formal adjudication of the point was waived, as unnecessary in that cause. The language was as follows: "The article relied on is in no ambiguous language; nothing could more explicitly declare the intention of the people, that, with the exceptions therein contained, the right to trial by Jury should never be invaded. Now the case presented by this bill is a controversy concerning property, and it is also a suit between parties; so that, unless it is a case in which, at the time of the adoption of the constitution, a different mode of trial could be said to have been practised, it is most clearly included in the article. But we wish not to decide this question now, believing it not to be necessary, and that further time might enable us to show that the case comes within the practice. We find that the Colonial Legislature, in the year 1685, vested in the County Courts as ample jurisdiction in matters of equity, as exists in the Courts of Chancery in England. That statute continued in force until the grant of the provincial charter in 1691, by which the colonial statute was probably considered to be repealed. After the charter in 1692, the whole chancery power was vested in the governor and eight of the council, with a power to delegate it to a chancellor to be appointed by the governor. The next year the legislature, declaring that this mode of administering the power was found in practice to be inconvenient, repealed the law, and transferred the power to three commissioners; and, in the succeeding year, this tribunal was superseded, and a high Court of Chancery was established. We have it from tradition, and I have seen it somewhere in history, that these several acts became null and void by reason of the negative of the king, which was exercised according to the charter, within three years after their enactment; they were, however, in force, according to the provisions of the charter, until the veto of the king was made known to the constituted authorities here. Now, whether the framers of the constitution, and the people, had reference to those former chancery tribunals, when they adopted the exception to the general provision in the fifteenth article, may admit of question; we are inclined to think, however, that the word 'heretofore,' in the exception, could hardly be applicable to a practice which had ceased to exist nearly a century before the constitution was adopted. In regard to probate cases, and suits for redemption of mortgages, the practice of trying facts by the Court instead of the Jury, had continued down to the adoption of the constitution. But we

it is declared, that "when an issue in fact, proper for the cognizance of a Jury, is joined in a Court of Law, the parties have a right to a trial by Jury, which ought to be held sacred."[1] Whether this provision has ever been adjudged to extend to proceedings in Equity, subsequent to the creation of a Court of Chancery in that State, we are not informed. In the constitution of Virginia, the language is more general; it being declared, that "in controversies respecting property, and suits between man and man, the ancient trial by Jury of twelve men is preferable to any other, and ought to be held sacred."[2] In that of California, it is provided, that "the right of trial by Jury shall be secured to all, and remain inviolate forever; but a Jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law."[3] By the constitution of New York, it is to remain inviolate forever, "in all cases in which it has been heretofore used"; unless waived in civil cases by the parties.[4] But by the force of subsequent provisions of the Code of Procedure, abolishing the distinction between proceedings in Equity and at Law, it is conceived that the facts, in all cases, may be tried by Jury, if demanded.[5] Undoubtedly they may be in Louisiana, where this right is granted generally, in all cases, if required by either party;[6] and probably, also, in those other States where the sole remedy is by petition and answer, no distinction existing between remedies

say again, that we do not wish to decide this question now, any further than to declare, that a reasonable construction of the fifteenth article does not require that a suit in Chancery shall be tried just as a suit at common law would be, and that there is no necessity that the whole case shall be put to the Jury. The most that can be made of the article is, that all controverted facts deemed essential to the fair and full trial of the case, shall be passed upon by the Jury, if the parties, or either of them, require it. And whether the facts proposed to be so tried are essential or not, must of necessity be determined by the Court. There may be many facts stated in a bill and denied in an answer, and also facts alleged in the answer, which are wholly immaterial to the merits of the case, and such facts the Court may refuse to put to the Jury; just as in an action at common law, if a party offers to prove facts which are irrelevant, the Court may reject the proof; and as immaterial issues, even after verdict, may be rejected as nugatory. The right of the party to go to the Jury is preserved, if he is allowed that course in regard to all such facts as have a bearing upon the issue for trial." [Ward *v.* Hill, 4 Gray, 595.] In *New Hampshire*, the question, whether the defendant, in a bill in equity, has a constitutional right to a trial by Jury, of the material facts in issue, was a point directly in judgment, and was decided in the affirmative. Marston *v.* Brackett, 9 N. Hamp. 336, 349. And see N. Hamp. Rev. Stat. 1842, ch. 171, § 8; [Tappan *v.* Evans, 11 N. Hamp. 334; Dodge *v.* Griswold, 12 Ib. 573.]

[1] *Vermont*, Const. (1793), ch. 1, art. 12.

[2] *Virginia*, Const. (1796, 1851), Bill of Rights, § 11.

[3] *California*, Const. (1849), art. 1, § 3, Stat. 1850, ch. 142, §§ 136, 160.

[4] *New York*, Const. (1846), art. 1, § 2.

[5] N. Y. Code of Procedure, §§ 62, 208, 221, 225 [252, 266, 270]; Lyon *v.* Ayres, 1 Code Rep. N. S. 257.

[6] *Louisiana*, Code of Practice, §§ 494, 495; *Texas*, Const. (1845), art. 4, §§ 16, 18, 19; Id. art. 1. § 12.

in Equity and at Law; as in the case in California and Georgia, and in the other States before mentioned. In Delaware, it is required by the constitution, that "trial by Jury shall be as heretofore"; but it seems to be extended, by statute, to all cases.[1] In the States of Rhode Island, Connecticut, New Jersey, Florida, Mississippi, Tennessee, Kentucky, Ohio, Alabama, Missouri, Arkansas, Texas, and Iowa, the *constitutional* provision is simply, that "the right of trial by Jury shall remain inviolate"; the words being in each constitution nearly the same, and without qualification.[2] The same provision exists in the constitution of Indiana, where it is expressly extended to all civil cases; in those of Maryland, Illinois, and Wisconsin, where it is applied only to "all cases at law"; or to "civil proceedings in Courts of Law"; and in those of South Carolina and Georgia, where it is qualified by the addition of the words "as heretofore used in this State." It is qualified in a similar manner in the constitution of Pennsylvania.[3] In the constitution of Michigan it is provided, that "the right of trial by Jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law"; — a provision apparently copied from that in New York, with a studious omission of the words "in all cases in which it has been heretofore used."[4]

§ 265. In other States, as well as in some of those above mentioned, the right of trial by Jury, in all civil cases, without exception, is further secured by statute. Thus, in the Code of Iowa, it is enacted, that issues of fact shall be tried by the Court, *unless*

[1] *Delaware*, Const. (1831), art. 1, § 4. In the constitution of this State, in 1776, it was declared, "That trial, by Jury, of facts, where they arise, is one of the greatest securities of the lives, liberties, and estates of the people." Declaration of Rights, art. 13. And accordingly, in the Revised Statutes of 1852, ch. 95, § 1, it is enacted, that "where matters of fact, proper to be tried by Jury, shall arise in any cause depending in Chancery, the Chancellor *shall* order such facts to trial by issues at the bar of the Superior Court."

[2] *Rhode Island*, Const. (1842), art. 1, § 15; *Connecticut*, Const. (1818), art. 1, § 21; *New Jersey*, Const. (1844), art. 1, § 7; *Florida*, Const. (1838), art. 1, § 6; *Mississippi*, Const. (1817, 1832), art. 1, § 28; *Tennessee*, Const. (1796, 1835), art. 1, § 6; *Kentucky*, Const. (1799), art. 13, § 8; *Ohio*, Const. (1802, 1851), art. 1, § 5; *Alabama*, Const. (1819), art. 1, § 28; *Missouri*, Const. (1821), art. 11, § 8; *Arkansas*, Const. (1836), art. 2, § 6; *Texas*, Const. (1845), art. 1, § 12; *Iowa*, Const. (1844), art. 2, § 9.

[3] *Indiana*, Const. (1816, 1851), art. 1, § 20; *Maryland*, Const. (1851), art. 10, § 4; *Illinois*, Const. (1818, 1847), art. 13, § 6; *Wisconsin*, Const. (1848), art. 1, § 5; *South Carolina*, Const. (1790), art. 9, § 6; *Georgia*, Const. (1798, 1839), art. 4, § 5; *Pennsylvania*, Const. (1838), art. 9, § 6. [Causes in Equity are not within the provision of the State constitution requiring all civil cases to be tried in the county in which the defendant resides. Jordan *v.* Jordan, 12 Geo. 77. Where titles to property are in dispute before a Court of Chancery, a Jury alone is competent to determine the real truth of the fact. McDougald *v.* Dougherty, 11 Geo. 570; Mounce *v.* Byars, Ib. 180; Brown *v.* Burke, 22 Ib. 574.]

[4] *Michigan*, Const (1836, 1850), art. 6, § 27.

one of the parties require a Jury.[1] And in North Carolina, it is made "the duty of the Court, to direct the trial of such issues as to the Court may appear necessary, according to the rules and practice in Chancery, in such cases."[2] In Georgia, the Superior and Inferior Courts, which are Courts of general jurisdiction in civil cases, both at law and in Equity, have "full power and authority" to hear and determine all causes in their respective tribunals by Jury;[3] and the course of such trials, in cases in Equity, is provided for by the general rules in Equity.[4]

§ 266. In view of these express declarations respecting the great value of the trial by Jury, and of the sacredness of the right, and the care taken for its preservation, no one will deny that it is a mode of trial highly favored, and intimately connected with the general welfare. And therefore it may deserve to be considered, whether in those States where Courts of Equity are "authorized and empowered," or "permitted," to direct issues to the Jury for the trial of material facts, it be not their duty so to do, and whether the parties may not demand it of right; unless, perhaps, in those cases where the statute expressly leaves it in the discretion of the Court; it being the well-known rule of law, that words of permission, in a statute, if tending to promote the public benefit, or involving the rights of third persons, are always held to be compulsory.[5] Such permission and authority to direct a trial by Jury, "if there be an issue as to matter of fact, which shall render the intervention of a Jury necessary," is found in the statute of Arkansas, and is copied, in nearly the same words, in that of Wisconsin.[6] In Alabama, the Courts, sitting in chancery, "may direct an issue or fact to be tried whenever they judge it necessary."[3] In Virginia, "any Court, wherein a chancery case is pending, may

[1] *Iowa*, Code of 1851, § 1772.

[2] *North Carolina*, Rev. Stat. 1836, Vol. 1, ch. 32, § 4.

[3] Hotchk. Dig. p. 529, § 149; 1 Cobb's Dig. p. 463.

[4] Hotchk. Dig. p. 953, 954, Reg. 1, 6.

[5] So held in Rex *v.* Mayor, &c., of Hastings, 1 D. & R. 148; where the words were "*may have power* to have and hold a Court of Record," &c. So, where the churchwardens and overseers *shall have power and authority* to make a rate to reimburse the constable. Rex *v.* Barlow, 2 Salk. 609. So, where the Chancellor *may* grant a commission of bankruptcy. Blackwell's case, 1 Verm. 152. So, where the trustees of a public charity, under the will of the founder *may* remove a pensioner, for certain causes. Att'y-Gen. *v.* Lock, 3 Atk. 164. And see Newburg Turnp. Co. *v.* Miller, 5 Johns. Ch. R. 113; Rex *v.* Com'rs of Flockwold, 2 Chitty, R. 251; Dwarris on Stat. 712; Rex *v.* Derby, Skin. 370; 1 Kent, Comm. [467], 517; Simonton, *ex parte*, 9 Port. 390; Malcolm *v.* Rogers, 5 Cowen, 188; 1 Pet. 64. [So, where the statute provides that the respondent in chancery "may be allowed to file his answer at any time before final decree," the word *may* was held to be imperative, and that the Court were without discretion in the matter. Bean *v.* Simmons, 9 Gratt. (Va.), 389.]

[6] *Arkansas*, Rev. Stat. 1837, ch. 23, § 64; *Wisconsin*, Rev. Stat. 1849, ch. 84, § 31.

[3] Toulm. Dig. 487; English's Dig. ch. 28, § 62.

direct an issue to be tried in such Court, or in any circuit, county, or corporation Court."[1] The precise construction of these provisions, and whether they would justify the Court in refusing to grant a trial of material facts by Jury, when claimed by the parties, yet remains to be settled. Probably few Judges, at the present day, in any State where the law is not perfectly clear against it, would venture to deny such an application, in a case *proper* for a Jury, nor to disregard the verdict, if fairly rendered, upon a legal trial. And in proportion to the *duty* of directing an issue to the Jury, is the obligation on the Judge to be governed by their verdict.

§ 267. Thus it appears, that the regular course of Chancery proceedings, as heretofore used in England, is not strictly followed in any State of the Union. In some States, the proceedings in Chancery are by bill and answer, the common-law remedy being by writ, as before; in others, there is but one, and that a brief form of remedy, pursued alike in all cases. In some, the parties may examine each other as witnesses; in others, this is not permitted. In some, the witnesses may be examined in Court, *vivâ voce*, as at law; in others, the testimony is always taken in writing, either in open Court, by the Clerk or the Judge, or in depositions, after the former method. In the latter case, however, there is this further diversity of practice, that, in some States, the parties may examine and cross-examine the witnesses, *ore tenus*, before the magistrate or commissioner; in others, they may only propound questions in writing, through the commissioner; in others, they may only be present during the examination, and take notes of the testimony, but without speaking; while in others, the parties are still excluded from the examination. In some of the States, also, it is required that all matters of fact, in all cases, shall be tried by the Jury; in others, it is at the option of the parties; in others, it is apparently left in the discretion of the Court; but with plain intimations that it ought not to be refused, unless for good cause. Other changes in the course of Chancery proceedings might be mentioned; but these will suffice to show how difficult it is, if not impossible, to prepare a complete system of the law of evidence in Equity, adapted alike to all the States in the Union. An approximation to this result is all that the author can hope to attain.

[1] *Virginia*, Rev. Code, 1849, ch. 177, § 4, and note.

# NOTE.

During the composition of this volume, the Practice and Course of proceeding in the High Court of Chancery in England have been amended and materially reformed, by Stat. 15 & 16 Vict. c. 86 (July 1, 1852), and by the Orders made by the Lord Chancellor, pursuant to the provisions of that statute; some account of the leading features of which will not be unacceptable to the profession in the United States, and is therefore subjoined.

The practice of engrossing bills and claims on parchment, and of issuing a *subpœna* to appear and answer, is abolished; instead of which the plaintiff files a printed bill or claim, and serves a printed copy on the defendant. Stat. 15 & 16 Vict. c. 86, §§ 1 – 4. Of these printed bills or claims, the plaintiff is required to deliver to the defendant or his solicitor such a number as he may have occasion for, not exceeding ten, at a halfpenny each folio. Id. § 7. Orders, Aug. 7, 1852. Ord. 5, 6.

The copy of the bill or claim filed is to be interleaved; and where by the former practice, an amendment may be made, without a new engrossment, it may now be made by written alterations on the printed bill or claim, or on the interleaves; an amended copy being served as before. Stat. Sup. § 8. Ord. 7, 9, 10.

Every bill must contain, as concisely as may be, a narrative of the material facts and circumstances on which the plaintiff relies; divided into paragraphs and numbered consecutively; each paragraph containing, as nearly as may be, a distinct statement or allegation; and must pray for specific and general relief; but must not contain interrogatories to the defendant. Stat. Sup. § 10. A brief form for a bill, pursuant to this section, is appended to the new Orders. Ord. 14.

If the plaintiff requires an answer from the defendant, he is to file interrogatories in the Record Office, for the examination of the defendant, (serving a copy on him or his solicitor,) within the time limited in the Orders. Stat. Sup. § 12. Ord. 15 – 20.

The defendant's answer to the bill may contain not only his answers to the plaintiff's interrogatories, filed as above, but any other statements he may be advised to set forth by way of defence; to be divided into paragraphs and numbered, as is required in the bill. Stat. Sup. § 14. A brief form of such answer is also appended to the Orders. Ord. 21.

The practice of excepting to bills, answers, and other proceedings, for impertinence, is abolished; but the party may be punished in costs. Stat. Sup. § 17.

The Court may order the defendant to produce, under oath, such documents in his possession or power relating to matters in question in the suit, as the Court shall think right; and may deal with them, when produced, as may appear just. Stat. Sup. § 18.

The defendant, after answering the bill or claim, if an answer is required, may either file a cross-bill of discovery, or may examine the plaintiff upon interrogatories, filed in the Record Office, and having a concise statement prefixed to them of the subjects on which a discovery is sought; which, being duly served, the plaintiff is bound to answer in like manner as if the interrogatories were contained in a bill of discovery. And the practice of the Court in regard to excepting to answers for insufficiency and for scandal, is to apply to the answers of such interrogatories; the Court, in determining their materiality or relevancy, to have regard to the bill, and the defendant's answer, if any, to the bill or to interrogatories. Stat. Sup. § 19.

After answer, if an answer is required, or otherwise, at any time, the Court, upon application of the defendant, may order the production of documents by the plaintiff, in like manner as above stated in § 18. Stat. Sup. § 20.

If the defendant shall not have been required to answer, and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill. Stat. Sup. § 26. But a replication is still to be filed. Ord. 28.

The old mode of examining witnesses is no longer to be observed, except in cases where it may be specially ordered by the Court, as varied by the new General Orders, or by special order in any particular case. Stat. Sup. § 28.

The plaintiff, within seven days after a suit commenced by bill is at issue, may give notice to the defendant that he desires that the evidence in the cause be taken orally, or upon affidavit, as the case may be; and if upon affidavit, and the defendant shall not, within fourteen days more, give notice to the plaintiff that he desires the evidence to be oral, both parties may verify their cases by affidavit. Stat. Sup. § 29, Ord. 31.

When a party desires that the evidence should be adduced orally, and gives notice as above, it shall be so taken; provided, that where the desire proceeds from a party not having sufficient interest in the matters in question, the Court may make such order as shall be just. Stat. Sup. 30.

Witnesses to be examined orally, as above, are to be examined by or before one of the examiners of the Court, or by one specially appointed; who is to be furnished with a copy of the bill and answer. The examination is to be in presence of the parties, their counsel, solicitors, or agents; the examination, cross-examination, and re-examination to be conducted as in the Courts of Common Law in regard to witnesses about to go abroad, and not to be present at the trial. The depositions are to be taken down by the examiner, in the form of narrative, and not ordinarily by question and answer; and to be signed by the witness, or by the examiner, if he refuses. But the examiner may put down any particular question and answer, if he sees special cause; and may state any special matter to the Court. And if any question is objected to, he is to note the objection, and state his opinion thereon to the counsel or party, and refer to such statement, on the face of the deposition; but he has no power to decide on the materiality or relevancy of any question; but that subject is to be dealt with in costs, by the Court. Id. §§ 31, 32.

Though evidence be elected to be taken orally, yet affidavits by particular witnesses, or to particular facts, may be used by consent, or by leave of the Court, granted on notice. Id. § 36.

Any *cestui que trust* may have a decree for the execution of the trusts, without serving any other *cestui que trust.* Any executor, administrator, or trustee may have a decree against any one legatee, next of kin, or *cestui que trust.* And trustees, in all suits concerning the trust property, shall represent the persons beneficially interested therein. But in all such cases, except the last, the persons heretofore made parties are to be served with notice of the decree, with liberty to attend the subsequent proceedings under it, and may apply to add to it; and the Court has the power of requiring parties to be called in. Id. § 42. The former practice of setting down a cause merely on the objection of the want of parties, is abolished. Id. § 43.

If a person interested in the suit dies, and has no legal personal representative, the Court may proceed without one, or may appoint some person to represent the estate in that suit: and the estate shall be bound thereby. Id. § 44.

No suit is to be dismissed for misjoinder of parties; but the decree is to be modified, and amendments to be directed, according to the special circumstances of the case. Id. § 49.

No suit is to be open to the objection, that it seeks only a declaratory order or decree; but the Court may make binding declarations of right, without granting consequential relief. Id. § 50.

The Court may also adjudicate on questions between some of the parties interested in the property in question, without making the other persons, interested in the property, parties to the suit; or may refuse to do so, at its discretion. Id. § 51.

Upon a suit becoming abated by death, marriage, or otherwise, or defective by any change of interest, or liability, a bill of revivor or supplemental bill is no longer necessary; but the proper parties may be called in by an order, duly served, operating to the same effect as though a bill of revivor or a supplemental bill were filed. Id. § 52.

New facts occurring since the filing of a bill may be introduced by way of amendment, without a supplemental bill. Id. § 53. And if the cause is not in such a state as to allow of an amendment being made to the bill, the plaintiff may file in the Clerk's Office a statement of the new facts he desires to put in issue; to which the same proceedings shall be had as though the statement were embodied in a supplemental bill. Ord. 44.

The Court may, by special orders, direct the mode in which any account shall be taken or vouched; and may, in its discretion, direct that the books in which the accounts, required to be taken in any particular case, have been kept, shall be taken as *primâ facie* evidence of the truth of matters therein contained, subject to objections from the parties interested. Stat. Sup. § 54.

Real estate, which is the subject of suit, may, if it appear expedient to the Court, for the purposes of the suit, be sold under an interlocutory order of the Court, at any time after the institution of the suit; in as valid a manner as if sold under a decree or a decretal order on the hearing of the cause. Id. § 55.

The practice of directing a case to be stated for the opinion of any Court of Common Law, is abolished; and the Court of Chancery is empowered to determine all questions of law, which it may deem necessary to decide, previous to the decision of the equitable question at issue. Id. § 61. And where, under the former practice, the Court of Chancery declined to grant equitable relief until

the parties had established their legal title by a suit at law, it is now empowered to determine the legal title, without requiring the parties to proceed at law. Id § 62.

The Lord Chancellor, with the assistance of other Judges named, is required to make rules and orders from time to time, to carry this statute into effect; to be forthwith submitted to Parliament, and if not disapproved by Parliament within thirty-six days thereafter, then to remain of force as General Orders of the Court. Id. §§ 63, 64.

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The forms of the bill, interrogatories, and answers, set forth by the Lord Chancellor, pursuant to the above statute, are as follows: —

*Form of Bill.*

In Chancery.

John Lee . . . . . Plaintiff;

James Styles and Henry Jones . . . . . Defendants.

*Bill of Complaint.*

To the Right Honorable Edward Burtenshaw, Baron St. Leonards, of Slaugham, in the county of Sussex, Lord High Chancellor of Great Britain.

Humbly complaining, showeth unto his Lordship, John Lee, of Bedford Square, in the county of Middlesex, Esq., the above-named plaintiff, as follows: —

1. The defendant, James Styles, being seised in fee-simple of a farm called Blackacre, in the parish of A, in the county of B, with the appurtenances, did, by an indenture dated the 1st of May, one thousand eight hundred and fifty, and made between the defendant, James Styles, of the one part, and the plaintiff of the other part, grant and convey the said farm with the appurtenances unto, and to the use of, the plaintiff, his heirs and assigns, subject to a proviso for redemption thereof, in case the defendant, James Styles, his heirs, executors, administrators, or assigns, should on the 1st of May, one thousand eight hundred and fifty-one, pay to the plaintiff, his executors, administrators, or assigns, the sum of five thousand pounds, with interest thereon, at the rate of five pounds per centum per annum, as by the said indenture will appear.

2. The whole of the said sum of five thousand pounds, together with interest thereon at the rate aforesaid, is now due to the plaintiff.

3. The defendant, Henry Jones, claims to have some charge upon the farm and premises comprised in the said indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants, James Styles and Henry Jones, and required them either to pay the said debt, or else to release the equity of redemption of the premises, but they have refused so to do.

5. The defendants, James Styles and Henry Jones, pretend that there are some other mortgages, charges, or encumbrances affecting the premises, but they refuse to discover the particulars thereof.

6. There are divers valuable oak, elm, and other timber, and timber-like trees growing and standing on the farm and lands comprised in the said indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, which trees and timber are a material part of the plaintiff's said security; and if the same or any of them were felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7. The defendant, James Styles, who is in possession of the said farm, has marked, for felling, a large quantity of the said oak and elm trees and other timber, and he has, by handbills, published on the 2d December, instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of said trees and timber on the said farm.

*Prayer.*

The plaintiff prays as follows: —

1. That an account may be taken of what is due for principal and interest on the said mortgage.
2. That the defendants, James Styles and Henry Jones, may be decreed to pay to the plaintiff the amount which shall be so found due, together with his costs of his suit, by a short day to be appointed for that purpose, or, in default thereof, that the defendants, James Styles and Henry Jones, and all persons claiming under them, may be absolutely foreclosed of all right and equity of redemption in or to the said mortgaged premises.
3. That the defendant, James Styles, may be restrained by the injunction of this honorable Court from felling, cutting, or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said indenture of mortgage, or any part thereof.
4. That the plaintiff may have such further or other relief as the nature of the case may require.

Names of the defendants.

The defendants to this bill of complaint are: —

James Styles,
Henry Jones.

Y. Y.,
(Name of counsel.)

NOTE. — This bill is filed by Messrs. A. B. and C. D., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named plaintiff.

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*Form of Interrogatories.*

In Chancery.

John Lee . . . . . Plaintiff;

James Styles and Henry Jones . . . . . Defendants.

Interrogatories for the examination of the above-named defendants in answer to the plaintiff's bill of complaint.

1. Does not the defendant, Henry Jones, claim to have some charge upon the

farm and premises comprised in the indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned?

2. What are the particulars of such charge, if any; the date, nature, and short effect of the security, and what is due thereon?

3. Are there or is there any other mortgages or mortgage, charges or charge, encumbrances or encumbrance, in any and what manner affecting the aforesaid premises, or any part thereof?

4. Set forth the particulars of such mortgages or mortgage, charges or charge, encumbrances or encumbrance; the date, nature, and short effect of the security; what is now due thereon; and who is or are entitled thereto respectively; and when and by whom, and in what manner, every such mortgage, charge, or encumbrance was created.

The defendant, James Styles, is required to answer all these interrogatories.

The defendant, Henry Jones, is required to answer the interrogatories numbered 1 and 2.

Y. Y.,
(Name of counsel.)

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*Form of Answer.*

In Chancery.

John Lee . . . . . Plaintiff;

James Styles and Henry Jones . . . . . Defendants.

The answer of James Styles, one of the above-named defendants to the bill of complaint of the above-named plaintiff.

In answer to the said bill, I, James Styles, say as follows: —

1. I believe that the defendant, Henry Jones, does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned.

2. Such charge was created by an indenture dated the 1st of November, one thousand eight hundred and fifty, made between myself on the one part, and the said defendant, Henry Jones, of the other part, whereby I granted and conveyed the said farm and premises, subject to the mortgage made by the said indenture of the 1st of May, one thousand eight hundred and fifty, unto the defendant, Henry Jones, for securing the sum of two thousand pounds and interest at the rate of five pounds per centum per annum, and the amount due thereon is the said sum of two thousand pounds, with interest thereon, from the date of such mortgage.

3. To the best of my knowledge, remembrance, and belief, there is not any other mortgage, charge, or encumbrance affecting the aforesaid premises.

M. N.,
(Name of counsel.)

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Proceedings by claim, instead of by bill, were regulated by the Orders of April 22, 1850; which permitted the following parties to pursue this brief method of relief: —

1. A creditor, seeking payment out of the personal estate of his deceased debtor.

2. A legatee, seeking payment of his legacy out of the personal estate of the testator.

3. A residuary legatee, seeking an account of the residue, and payment or appropriation of his share.

4. Any person entitled to a distributive share of an intestate's personal estate, and seeking an account and payment.

5. An executor or administrator, seeking to have the personal estate administered under the directions of the Court.

6. A legal or equitable mortgage, or person entitled to a lien as security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

7. A person entitled and seeking to redeem such mortgage or lien.

8. A person entitled to and seeking the specific performance of an agreement for the sale or purchase of any property.

9. A person entitled to and seeking an account of the transactions of a partnership which is dissolved or has expired.

10. A person entitled to an equitable estate or interest, seeking to use the name of his trustee in a suit at law, for his own benefit.

11. A person entitled to have a new trustee appointed, in a case where the instrument creating the trust contains no power for that purpose, or the power cannot be exercised, and seeking to have a new trustee appointed.

In other cases, parties may prosecute by claim, on special leave of the Court, upon the *ex parte* application of the person seeking equitable relief.

These claims are subject to the General Orders and practice of the Court, in the same manner as proceedings by bill, so far as the rules may apply.

Forms are set forth, in the schedules annexed to these Orders, for the pursuit of these remedies by claim; of which the following claim for specific performance of an agreement, may serve as a specimen: —

In Chancery.

Between A. B., Plaintiff.
C. D., Defendant.

The claim of A. B., of ———, the above-named plaintiff. The said A. B. states, that by an agreement dated the ——— day of ———, and signed by the above-named defendant, C. D., he, the said C. D., contracted to buy of him [*or* "to sell to him"] certain freehold property [*or* "copyhold," "leasehold," *or other property as the case may be,*] therein described or referred to, for the sum of ——— pounds; and that he has made or caused to be made an application to the said C. D., specifically to perform the said agreement on his part, but that he has not done so, and the said A. B. therefore claims to be entitled to a specific performance of the said agreement, and to have his costs of this suit; and for that purpose to have all proper directions given. And he hereby offers specifically to perform the same on his part. [* See 1 Seton Dec. (Eng. Ed. 1862), 9–13, and Daniel's Chan. Pract. (3d Amer. Ed.), end of Vol. III., for the modifications made by General Orders of 5th Feb., 1861, of the course of proceeding prescribed by the 15 & 16 Vict. c. 86, as to the mode of examining witnesses and taking evidence, and the practice relating thereto.]

# CHAPTER II.

## OF THE SOURCES, MEANS, AND INSTRUMENTS OF EVIDENCE.

[* § 268. The sources of evidence in equity.
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291. Rule when a bill for *discovery* is made by amendment a bill for *relief*.
291 *a*. Testimony taken in original suit may be used in case of *supplemental bill*.
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296. When they are in defendant's power.
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300. Certain documents exempted from discovery.
301. American practice to deposit documents with clerk of court generally.

§ 302. Production obtained from plaintiff by cross bill.
303. Some exceptions in the English practice.
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305. Documents in possession of one not a party obtained by *subpœna duces tecum*.
306. As to proof of documents produced on notice.
307. Effect of order for production of documents.
308. Written documents proved as at law.
309. Witnesses may be examined *vivâ voce* at hearing in certain cases.
310. Questions admitting cross examination generally excluded at such examination.
311. Formal proof of documents does not entitle adverse party to inspection before hearing.
312. General rule to exclude oral testimony.
313. Witnesses competent at law, are competent in equity. Parties to record competent in equity.
314. Plaintiff may sometimes examine co-plaintiff.
315. Sometimes also one of several defendants.
316. Such examination ordinarily operates as an equitable release to the defendant, as to matters interrogated of.
317. Defendant may sometimes examine plaintiff as a witness.
318. Co-defendants may be witnesses for each other.
319. Testimony may be taken in Federal courts of United States upon commissions.
320. In case of disagreement between parties, master settles form of interrogatories.
321. Time for taking testimony and publication.
322. Practice in reference to taking testimony *de bene esse*.
323 and 324. Matters of practice in taking depositions under a commission.
325. Testimony may be taken *in perpetuam rei memoriam*.
326. The admissibility of depositions.
327. Rules of examination of witnesses generally same in equity as at law.
328. Trial by personal examination of subject of controversy, how far resorted to.
329. Most frequently exercised in cases concerning patent rights and copyrights.
330. The judge may require further proof upon his own motion.
331. May obtain it by examination of witnesses *vivâ voce*.
332. By reference to a master.
333. Master's authority defined.
334. Witnesses, how summoned.
335. Practice in taking accounts before master.
336. Witnesses previously examined in the cause not examined before the master without order of court.
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339. Manner of trial of an issue from chancery by a court of law.
340. Evidence allowed upon special order in cases of inconvenience and unreasonable expense.
341. Testimony taken in another cause, how and when admitted.
342. Requisites of depositions taken in cross cause.

§ 343. Admission of evidence taken in the Exchequer or Admiralty Court.
344. Evidence of parties and interested witnesses, when allowed in special order.
345 and 346. Re-examination of a witness to supply defect in former testimony, how allowed by special order.
347. Depositions may be amended in open court.
348. Evidence admitted on special order to impeach witnesses.

§ 268. THE SOURCES OF EVIDENCE in Equity are principally four; namely, first, the intelligence of the Court, or *the notice which it judicially takes* of certain things, and the *things which it presumes;* secondly, the *admissions of the parties*, contained in their *pleadings and agreements;* thirdly, *documents;* and, fourthly, *the testimony of witnesses.*

### 1. THINGS JUDICIALLY TAKEN NOTICE OF, AND PRESUMED.

§ 269. The first of these, namely, THINGS JUDICIALLY TAKEN NOTICE OF, has already been briefly treated in a preceding volume:[1] The principle on which such notice is taken, is the universal notoriety of the facts in question. These are sometimes distributed into two classes, composed of those things of which the Court *suo motu* takes notice, and those of which it does not *suo motu* take notice, but expects its attention to be directed to them by the parties; in which latter class are enumerated those local and personal statutes, in which it is enacted, that they shall be judicially taken notice of without being specially pleaded; journals of the two houses of the legislature; public proclamations; public records, &c. But this distinction is of little or no practical importance; since, in the progress of every trial, the attention of the Court is always called alike to all matters within its cognizance, which the parties or their counsel deem material to their respective interests, to whichsoever of those two classes they may seem to belong; and whenever a document or writing is required to aid the recollection of the Court, it is generally provided beforehand for the occasion. It is, for example, wholly immaterial, in the final result, whether the facts of public and general history and their dates are recognized by the Court *suâpte sponte*, the books and chronicles or almanacs being used merely to aid the memory; or whether they will remain unnoticed until suggested by the parties and verified by the books; or whether the books themselves are adduced by

[1] *Ante*, Vol. 1, ch. 2, per tot.

the parties and admitted by the Court as instruments of evidence, in the nature of public documents; the process and the result being in each case the same.[1] Neither is it possible to distinguish *à priori*, between those subjects of science which are *in fact* of such notoriety as entitles them to be judicially recognized, and those which are not; nor, between those things which ought to be generally known, and those, the knowledge of which is not of general obligation; since each particular case must be decided by the Judge, as it occurs, and he can have no other standard than the measure of his own information or learning; — a standard subject to variations as numerous as the individuals by whom it is to be applied. This standard also must be liable to constant changes with the advancement and gradual diffusion of science; many things which formerly were occult, and to be proved by experts, as, for example, many facts in chemistry, and the like, being now, in the same places, matters of common learning in the public schools. The same may, in some degree, be said of every branch of physical science, of geographical knowledge, and of the religion and customs of foreign nations. A different application of the rule may also be requisite in different parts of the same country or government, as, for example, Maine and California, or England and Australia, or India.

§ 270. In regard to *the means or instruments to which resort is usually had by the Court, for the more accurate recollection of matters of general notoriety*, it may be observed, that the preamble of a public statute will ordinarily be sufficient for the knowledge of any general fact it recites,[2] any communication from the Secretary of State will suffice, as to the precise state of our relations with a foreign government;[3] the government Gazette, for the dates of public events, such as proclamations of war or peace, signature of treaties, terms of capitulations, and the like;[4] the diplomatic communications of our ministers abroad, for the relations of foreign governments to each other,[5] and, generally, public documents for the public facts they contain.[6]

§ 271. In taking notice of the *common and unwritten law* or customs of the country, resort is had to the reported judgments of

[1] *Ante*, Vol. 1, § 497.
[2] Doct. & St. b. 2, ch. 55; 1 Inst. 19 b; Rex *v.* Sutton, 4 M. & S. 542.
[3] Taylor *v.* Barclay, 2 Sim. 220. And see *ante*, Vol. 1, §§ 6, 490, 491.
[4] *Ante*, Vol. 1, § 492.
[5] Thelluson *v.* Cosling, 4 Esp. 266.
[6] *Ante*, Vol. 1, §§ 6, 490, 491.

the Courts, and to the great Text-books, such as the writings of Bracton, Lord Coke, Lord Hale, Sir Michael Foster, Fitzherbert, and others. There is, however, a diversity in the degrees of credit given to books of reports and to the judgments themselves, arising from the character of the reporter, and of the Court.[1] The judgments of Courts of appellate and ultimate jurisdiction are regarded as binding by those Courts whose decisions they are authorized to revise and reverse. And Judges, sitting at *nisi prius*, will not overrule or disregard the decisions *in banc* of their own Courts. But the decisions of other Courts of co-ordinate rank and authority, and the decisions of the Courts of other States, are not generally regarded as of binding force, or as conclusive evidence of the Common Law; but are read and respected according to the estimation in which the tribunals are held.

§ 272. The subject of *presumptions* having been treated in a previous volume,[2] what is there stated needs no repetition here. Wherever the entire case is heard and decided by the Judge or Chancellor, without a Jury, all inferences which Jurors might draw, and all things which they may lawfully presume, will be drawn and presumed by the Court.

### 2. ADMISSIONS.

§ 273. In the *second place*, as to ADMISSIONS MADE BY THE PARTIES. These are either in the *bill*, or in the *answer*, or in some *special agreement*, made in the cause, for the purpose of dispensing with other proof. And statements in the bill may sometimes be used against the plaintiff, and at others, in his favor.

§ 274. An ORIGINAL BILL, praying relief, is so framed as to set forth the rights of the plaintiff; the manner in which he is injured; the person by whom it is done; the material circumstances of the time, place, manner, and other incidents; and the particular relief he seeks from the Court.[3] It consists of several parts, the principal of which is termed the *premises*, or *stating part*, and contains a full and accurate narrative of the facts and circumstances of the plaintiff's case, upon which the ultimate decree is founded. Ordinarily, the bill is drawn by the solicitor, upon the general instructions given by his client, and is signed by

[1] See, on the estimation of authorities, Ram on Legal Judgment, ch. 18, per tot. [See also Mr. Wallace's work, "The Reporters Chronologically Arranged; with occasional remarks upon their respective merits." 3d ed. 1855.]

[2] *Ante*, Vol. 1, ch. 4, §§ 14–48.

[3] Story, Eq. Pl. § 23.

the solicitor only; and hence it has been regarded as the mere statement of counsel, frequently fictitious, and hypothetically constructed, in order to extract a more complete answer from the defendant. On this ground it has been laid down as a rule, in England, that "generally speaking, a bill in Chancery cannot be received as evidence, in a Court of Law, to prove any facts either alleged or denied in such bill"; though the rule is admitted to be subject to some exceptions.[1] But as this rule is avowedly founded on the assumption, that the statements in the bill are, in most cases at least, partially false, but permitted for the sake of eliciting truth, or are made upon misinformation, and to be afterwards corrected by amendment, upon better knowledge; it is plain that the rule ought to be restricted to cases falling within the principle on which it is founded, namely, to allegations of facts not lying within the peculiar knowledge of the counsel. But in England, since the adoption of this rule, and in the United States for a longer period, the use of fictions in pleading has been pointedly reprobated, and much effort has been employed, both by Courts and Legislatures, to obtain a simple statement of the truth, in all legal proceedings; and the success which has crowned these endeavors has materially weakened the reason of the rule, so far as it regards facts in the knowledge of the party alone, and not of his counsel. But however this may be, it is to be observed, that in some of the United States, bills are usually signed by the party, as well as by counsel; that some of the facts are ordinarily within the peculiar knowledge of the counsel, and not of the party; and that, in certain cases, either the bill itself is sworn to, or it is accompanied by an affidavit, stating the material facts. Such is the case in some bills of discovery; bills to obtain the benefit of lost intruments, and some others. Now, in all these and the like cases, it is not easy to perceive why the statements in the bill, consider-

[1] See the answer of the Judges, in the Banbury Peerage case, 2 Selw. N. P. 744. Mr. Phillips, in the earlier editions of his work on Evidence, states the rule as well settled, without qualification; but in the latest edition, after observing that the authorities are contradictory upon this subject, he only remarks, that "it seems to be the more prevalent opinion" that a bill in Chancery cannot be used at law as the admission of the plaintiff. 2 Phil. Ev. 28 (9th ed.). Mr. Justice Buller held it admissible in all cases where there had been proceedings upon the bill. Bull. N. P. 235. But in several American cases it has been rejected, in trials at law, on the ground that many of the facts stated were merely the suggestions of counsel. See Owens *v.* Dawson, 1 Watts, 149; Rees *v.* Lawless, 4 Litt. 218; Belden *v.* Davis, 2 Hall, N. Y. Rep. 444. If the bill has been sworn to, it is conceded to be admissible. See Rankin *v.* Maxwell, 2 A. K. Marsh. 488; Chipman *v.* Thompson, Walk. Ch. R. 405.

ately made, of facts known to the person making them, should not be received elsewhere, against the party, as evidence of his admissions of the facts so stated.[1] Where the statement has been sworn

[1] In Ld. Trimlestown *v.* Kemmis, 9 Cl. & Fin. 749, 777, 779, 780, which was a writ of error on a judgment in ejectment, the defendant put in evidence a deed of compromise between the widow of the plaintiff's ancestor and the lessor of the plaintiff, showing their dealings with the property in question; and then offered in evidence a bill in Chancery, filed by the administrator of the same ancestor against the same lessor, as his agent, and the decree thereon, *to explain* one of the items of account, in the schedule referred to in that deed of compromise; and for this purpose the bill was held admissible. The plaintiff also offered in evidence, by way of reply, a bill in Chancery filed against one of his ancestors, respecting the same premises, and the answer of his ancestor, stating what he had heard his grandmother, who was a jointress in possession of part of the lands, say, in regard to her refusing to join her son in any alienation of the estate. This evidence was held rightly rejected, as being *hearsay;* though it was conceded that, had it been the declaration of a *party* in possession of the estate, and made *against* his own interest, it might have been received.

In the subsequent case of Boileau *v.* Rutlin, 2 Exch. R. 665 (1848), which was *assumpsit* for use and occupation, the defence was, that the defendant had occupied under an agreement to purchase. Though he had given notice to the plaintiff to produce this agreement, he did not call for it, but in proof of it he put in a bill and other proceedings in a suit in Chancery brought by the plaintiff against him, for not performing that agreement, and stating its terms. This was objected to, but was admitted by Ld. Denman, as some evidence of the contract, reserving the point. On a motion for a new trial for this cause, after a full consideration of the subject, the evidence was held inadmissible, upon grounds stated by Parke, B., as follows: —

"It is certain that a bill in Chancery is no evidence against the party in whose name it is filed, unless his privity to it is shown. That was decided in Woollet *v.* Roberts, (*a*) though no such decision was wanted. The proceedings on such a bill, after answer, tend to diminish the presumption that it might have been filed by a stranger, and appear to have been held sufficient to establish the privity of the party in whose name it was filed. Snow *d.* Lord Crawley *v.* Phillips (*b*). When that privity is established, there is no doubt that the bill is admissible to show the fact that such a suit was instituted, and what the subject of it was; but the question is, whether the statements in it are any evidence against the plaintiff of their truth, on the footing of an admission. Upon this point the authorities are conflicting. In the case referred to in Siderfin, it would seem that the bill, which was filed by the defendant to be relieved from a bond as simoniacal, was used against him to prove that he was simoniacally presented; but it does not very distinctly so appear. In Buller's Nisi Prius (*c*) a bill in Chancery is said to be 'evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; and therefore, it amounts to a confession and admission of the truth of any fact; and if the counsel have mingled in it any fact that is not true, the party may have his action.' And, after referring to the conflicting authority in Fitzgibbon, 196, the author of that Treatise on the law of Nisi Prius lays it down as a clear proposition, that where the matter is stated by the bill as a fact on which the plaintiff founds his claim for relief, it will be admitted in evidence, and will amount to proof of a confession. These are the authorities in favor of the defendant. The recent case of Lord Trimlestown *v.* Kemmis, (*d*) which was also mentioned, is not one in his favor, for the bill was there admitted to show what the subject of the suit was, and to explain a subsequent agreement for a settlement between the parties. On the other hand, in the above-mentioned case of Lord Ferrers *v.* Shirley, (*e*) a bill preferred by the defendant, stating the existence of a deed at that time, was objected to as proof of that fact, on the ground that it was no more than the surmise of counsel for the better discovery of the title; and the Court would not suffer it to be read. And Lord Kenyon, in Doe *d.* Bowerman *v.* Sybourn, (*f*) where the distinction was insisted upon between facts stated by way of inducement, and those whereon the plaintiff founds his claim for relief, rejected that distinction, and pronounced his judgment, in which the Court acquiesced, that a bill in Chancery is never admitted further than to show

(*a*) 1 Ch. Ca. 64.
(*b*) 1 Sid. 220.
(*c*) Page 236.
(*d*) 9 C. & F. 749.
(*e*) Fitz, 195.
(*f*) 7 T. R. 2.

to, it constitutes a clear exception to the rule; and in either case it is ordinarily not conclusive, but open to explanation.[1]

that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions. And it appears that in Taylor *v.* Cole, (*a*) his Lordship held the same doctrine; with the exception, that a bill in Chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone, or an entry in a Bible. This exception also was disallowed by the opinion of the Judges in the Banbury Peerage case (reported in 1 Selwyn's Nisi Prius, 756, 20th ed., and correctly reported, for I have examined the books of the Committee of Privileges, 28th February, and 30th of May, 1809). The Judges unanimously held, that a bill in equity was no proof of the facts therein alleged, or as a declaration respecting pedigree; that it made no distinction that the bill was filed for relief. And, in answer to the question, whether any bill in Chancery can ever be received as evidence in the Court of Law, to prove any facts either alleged or denied in such bill, the Judges gave their opinion, that, generally speaking, a bill in Chancery cannot be received as evidence to prove any fact alleged or denied in such bill. But whether any possible case might be put which would form an exception to such general rule, the Judges could not undertake to say. In the case of Medcalfe *v.* Medcalfe, (*b*) Lord Chancellor Hardwicke held, that the rule of evidence at law was, that a bill in Chancery ought not to be received in evidence, for it is taken to be the suggestion of counsel only; but in the Court of Chancery it had been often allowed, and the bill was read. This distinction was afterwards repudiated in the case of Kilbee *v.* Sneyd, (*c*) by Lord Chancellor Hart. When the defendant's counsel offered to read part of the bill, as proof of certain facts on which he rested part of his defence, the Lord Chancellor said, the Court never read a bill *as evidence* of the plaintiff's knowledge of a fact. 'It is mere pleader's matter; the statements of a bill are no more than the flourishes of the draughtsman'; and that no decree was ever founded on the allegations of a plaintiff's bill, as evidence of facts; and he further said, that the statements of a bill are not evidence, and the registrar could not enter any part of it on his notes as read. In this state of the authorities directly bearing upon this question, there can be no doubt that the weight of them is against the reception of a bill in equity as an admission of the truth of any of the alleged facts. But it was argued, that there are many more recent authorities indirectly bearing upon this question, which afford a strong analogy in favor of the reception of a bill in equity as evidence in the nature of a confession. These are the cases of Brickell *v.* Hulse (*d*) and Gardner *v.* Moult, (*e*). In the first of these, a party using an affidavit on a motion, in the second, by sending another to state a particular fact, was held to make the affidavit and statement, respectively, evidence against himself. These cases do not fall under the description of pleadings by parties; they are rather instances of admission by conduct, and are analogous to those in which the declarations of third persons are made evidence by the express reference of the party to them as being true. This is the explanation very rightly given in Mr. Taylor's recent Treatise on Evidence. In the first of the above-mentioned cases it may be presumed that the defendant prepared the affidavit, which he afterwards exhibited as true; at all events, that he exhibited it *for the purpose of proving a certain fact.* In the second, it must be taken that he sent the servant to prove *a particular act of bankruptcy;* for, if he sent him to be examined as a witness, and to give evidence generally as to any act to which the commissioner might examine him, there could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, can never be done. (See Lord Denman's judgment in both the cases last cited.) The case of Cole *v.* Hadly (*f*) was also referred to as an authority. From the short report of that case, it is not clear on what ground the evidence was received. It would seem that it was received as the deposition of a witness on a prior inquiry, between the same parties, on the same question. It could not be on the ground that the statement was evidence against the party, simply because the witness was produced by him, as the contrary was laid down in the two cases of Brickell *v.* Hulse and Gardner *v.* Moult, which were referred to.

[1] See *ante*, Vol. 1, §§ 212, 551.

(*a*) 7 T. R. 9, n.
(*b*) 1 Atk. 63.
(*c*) 2 Molloy, 208.
(*d*) 7 A. & E. 454.
(*e*) 10 A. & E. 464.
(*f*) 11 A. & E. 807.

§ 275. In Courts of Equity, however, *the bill may be read as evidence for the defendant*, of any of the matters therein directly and positively averred.[1] For it is a part of that record upon the whole of which the decree is to be made; and whether the allegations be true or not, is immaterial, they being put forth as true, and of the nature of judicial admissions, for the purposes of that particular trial.[2] But it is only the amended bill that may thus be read, this alone being of record; unless the amendment has altered the effect of the answer, or rendered it obscure; in which case the original bill may be read by the defendant, for the pur-

These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated. Many cases were suggested in the argument before us, of the inconveniences and absurdities which would follow from their admission as evidence in other suits, of the truth of the facts stated. There is, however, we believe, no direct authority on this point. The dictum of Lord Chief Justice Tindal, in the Fishmonger's Company *v.* Robinson, (*a*) which was referred to in argument, seems to be considered as amounting to a decision on this point; but it was unnecessary for the determination of that case. It is enough, however, to say, that, as to bills in equity, the weight of authority is clearly against their admissibility, for the only purpose for which they were material in the present case; and we are bound by that authority." Id. 676 – 681.

From these and other authorities, it seems clear, that the bill, *if sworn to*, is evidence against the plaintiff as an admission of the truth of the facts therein stated. Its admissibility, however, does not depend on the oath, but on the fact that he is conusant of the statements in the bill, and solemnly propounds them as true. The oath is a proof of this knowledge and solemn assertion; but may not other evidence be equally satisfactory? If so, the question is reduced to the single point of the plaintiff's knowledge of what is contained in the bill; unless it be maintained that notwithstanding the present state of forensic law, parties are still at liberty to allege, as true, material propositions of fact which they know to be false. It is therefore conceived that, in the United States, and under the new rules of practice, the general question, as stated in Boileau *v.* Rutlin, may still be regarded as an open question. There was another ground on which the bill in chancery in Boileau *v.* Rutlin might well have been rejected, namely, that the admission it contained was a *confessio juris*, or, at most, a mixed proposition of law and fact, which is not to be proved by the mere admission of the party, when better evidence is within the power of the adverse party, by the production of the instrument itself. See *ante*, Vol. 1, § 96. [McRea *v.* Ins. Co. of Columbus, 16 Ala. 755.]

[1] 2 Dan. Ch. Pr. 974, 976 [* 3d Am. Ed. 832, 834]; Ives *v.* Medcalfe, 1 Atk. 63, 65. Such, also, was the opinion of Lord Chancellor Apsley, afterwards Earl Bathurst, the real author of the book so well known as Buller's Nisi Prius; as appears from the dedication of the first edition, and from Lord Mansfield's manner of quoting it, in 5 Burr. 2832. See Bull. N. P. 235; 2 Exch. Rep. 677, n.; *Ante*, Vol. 1, § 551.

[2] See *ante*, Vol. 1. §§ 169, 186, 208.

(*a*) 5 M. & G. 192.

pose of explaining the answer.[1] It may also be read, upon the question as to costs, for the purpose of showing *quo animo* the bill was filed.[2] And the plaintiff's bill, filed in another suit, may sometimes be read against him, on proof of his actual privity to the contents and to the filing of it; especially where it is read in explanation or corroboration of other evidence in the cause.[3] But where the plaintiff has incorrectly stated circumstances with which he may well be presumed to have been unacquainted, and the defendant does not rely upon them in his answer, the plaintiff will not be held bound by the statement.[4]

§ 276. The *bill* alone may also sometimes be *read by the plaintiff, as evidence against the defendant* of his admission of the truth of the matters therein alleged, and not noticed in his answer. The principle, governing this class of cases, is this, that the defendant, being solemnly required to admit or deny the truth of the allegations, has, by his silence, admitted it. *Qui tacet, cum loqui debet consentire videtur.* But this applies only to facts either directly charged to be within the knowledge of the defendant, or which may fairly be presumed to be so;[5] for if the matters alleged are not of either of these descriptions, the better opinion is, that the defendant's omission to notice them in his answer is merely matter of exception on the part of the plaintiff, in order to obtain a distinct admission or denial, upon the particular point.[6] If he replies, instead of excepting, he must prove the allegations.[7] If the defendant, being duly served with a *subpœna*, contumaciously neglects to appear and answer;[8] or moves to dismiss the bill, on the

[1] 2 Dan. Ch. Pr. 976 [* 3d Amer. Ed. 834]; Hales *v.* Pomfret, Dan. Exch. R. 141. And see M'Gowen *v.* Young, 2 Stewart, 276.

[2] Ibid.; Fitzgerald *v.* O'Flaherty, 1 Moll. 347.

[3] 2 Dan. Ch. Pr. 977 [* 3d Amer. Ed. 835]; Woollett *v.* Roberts, 1 Ch. Cas. 64; Handeside *v.* Brown, 1 Dick. 236; Lord Trimlestown *v.* Kemmis, 9 Cl. & Fin. 749.

[4] Wright *v.* Miller, 1 Sandf. Ch. R. 103.

[5] 2 Dan. Ch. Pr. 977, note by Perkins [* 3d Amer. Ed. 835]; Torrington *v.* Carson, 1 Porter, 257; Kirkman *v.* Vanlier, 7 Ala. 217; Ball *v.* Townsend, 6 Litt. 325; Moseley *v.* Garrett, 1 J. J. Marsh. 212; Tobin *v.* Wilson, 3 J. J. Marsh. 63; Pierson *v.* Meaux, 3 A. K. Marsh. 4.

[6] Ibid. And see Tate *v.* Connor, 2 Dev. Ch. 224; Lum *v.* Johnson, 3 Ired. Ch. 70; Cropper *v.* Burtons, 5 Leigh, 426; Coleman *v.* Lyne, 4 Rand. 454; [Ingraham *v.* Tompkins, 16 Mis. (1 Bennett) 399; Lyon *v.* Bolling, 14 Ala. 753; Hardy *v.* Heard, 15 Ark. 184; Ryan *v.* Melvin, 14 Ill. 68.]

[7] Cochran *v.* Cowper, 1 Harringt. 200. In Young *v.* Grundy, 6 Cranch, 51, it was said, in general terms, that if the answer neither admits nor denies the allegations in the bill, they must be proved at the hearing; the distinction taken in the text not being adverted to, as the case did not call for it. [So in Wilson *v.* Kenney, 14 Ill. 27, and in Trenchard *v.* Warner, 18 Ib. 142.] [* Distinct and positive allegations in a bill taken *pro confesso* must be taken as true without proof, as in case of a judgment by *nil dicit* at common law. This doctrine applies with equal force to bills of review. United States *v.* Samperyac, 1 Hemp. 118.]

[8] *Ante*, Vol. 1, § 18; Atwood *v.* Harrison, 5 J. J. Marsh. 329; Higgins *v.* Con-

ground that the claim is barred by lapse of time; or answers evasively; the allegations will be taken as admitted.[1] And where the plaintiff reads the defendant's answer in evidence against him, he may also read so much of the bill as is necessary to explain the answer.[2]

§ 277. The ANSWER *of the defendant*, being a deliberate statement on oath, is *evidence against him* of all the matters it contains; and is extremely strong, though not so entirely conclusive as to preclude him from showing that it was made under an innocent mistake.[3] And it may be read, notwithstanding the plaintiff, by his replication, has denied the truth of the whole answer.[4]

§ 278. But it is only the answer of a person *sui juris* that can be treated as an admission of the facts, so far as to dispense with other proof of them; and therefore the *answer of an infant* by his guardian, cannot be read against the infant, for he cannot make an admission which ought to bind him; though it may be read against the guardian, for it is he alone that makes oath to it.[5] Nor can an infant's case be stated by the Court of Chancery, for the opinion of a Court of Law; because the admissions in such

ner, 3 Dana, 1. In these cases, however, if there is no general order on the subject, it is usual to make a special order, that unless an answer is made within a certain time, the bill will be taken *pro confesso*. See Cory *v.* Gerteken, 2 Mad. 43; 1 Dan. Ch. Pr. 569 - 577 (Perkins's ed.) [* 3d Amer. Ed. 499 - 506]; 1 Hoffm. Ch. Pr. ch. 6, p. 184 - 190. [As to what will constitute a due service of a *subpœna*, so that a bill may be taken *pro confesso*, see 1 Dan. Ch. Pr. 498 - 530 (Perkins's ed.).] [* 3d Amer. Ed. 446 - 464.]

[1] Jones *v.* Person, 2 Hawks, 269; Sallee *v.* Duncan, 7 Munroe, 382; McCambell *v.* Gill, 4 J. J. Marsh. 87

[2] M'Gowen *v.* Young, 2 Stew. 276.

[3] [* The admissions in an answer not under oath may be used against the defendant, and without making the denials in such answer evidence for the defendant. Smith *v.* Potter, 3 Wis. 432.]

[4] [The omission of the respondent to assert a fact material to his defence, and which is at the time within his knowledge, though it may not deprive him of the benefit of testimony taken to establish the fact, is a reason for requiring more stringent proof. Goodwin *v.* McGehee, 15 Ala. 232.

The answer of a corporation, under the corporate seal, and signed by its president, has the same force and effect as evidence as the answer of an individual not under oath would have in like cases. Maryland, &c. Co. *v.* Wingert, 8 Gill, 170; State Bank *v.* Edwards, 20 Ala. 512. Such answer cannot be used as evidence, but it puts in issue the allegation to which it responds, and imposes on the complainant the burden of proving such allegation. Baltimore, &c. R. R. *v.* Wheeling, 13 Gratt. 40. See also Lovett *v.* Steam, &c. Assoc., 6 Paige, 54; McLaw *v.* Linnville, 10 Humph. 163; Carpenter *v.* Prov. Ins. Co., 4 How. U. S. 118.] [* And where the defendant in a bill to redeem in his answer expressly waives all objection to plaintiff redeeming upon the payment of such sum as shall be found due, he cannot afterwards insist that the mortgage had been foreclosed before the commencement of the suit. Strong *v.* Blanchard, 4 Allen, 538.]

[5] Eggleston *v.* Speke, 3 Mod. 558; Comb. 156, 2 Vent. 72, S. C.; Wrottesley *v.* Bendish, 3 P. Wms. 237; Legard *v.* Sheffield, 2 Atk. 377; Hawkins *v.* Luscombe, 2 Swanst. 392; Stephenson *v.* Stephenson, 6 Paige, 353; Kent *v.* Taneyhill, 6 G. & J. 1; Harris *v.* Harris, Id. 111; 1 Dan. Ch. Pr. 214; 2 Kent, Comm. 245. The infant's answer by his mother may be read against her. Beasley *v.* Magrath, 2 Sch. & Lefr. 34; [Watson *v.* Godwin, 4 Md. Ch. Decis. 25; Lenox *v.* Notrebe, 1 Hemp. 251; Eaton *v.* Tillinghast, 4 R. I. 276; Benson *v.* Wright, 4 Md. Ch. Decis. 278.]

case would not be binding on the infant.[1] So the *joint answer of husband and wife*, though it may be read against both, if it relates merely to the *personal* property belonging to the wife, yet if it relates to the *inheritance* of the wife, it cannot be read against her, though it still may be read against the husband.[2] But where the wife had represented herself and transacted as a *feme sole*, the other parties believing her to be such, and the husband had connived at the concealment of the marriage, her answer was allowed to be read against the husband.[3] And where a *feme covert*, being heir-at-law of a testator, lived separate and answered separate from her husband, pursuant to an order for that purpose, her admission of the will was held sufficient ground to establish it.[4]

[1] Hawkins *v.* Luscombe, 2 Swanst. 392.

[2] Evans *v.* Cogan, 2 P. Wms. 449. And see Merest *v.* Hodgson, 9 Price, 563; Elston *v.* Wood, 2 M. & K. 678; Ward *v.* Meath, 2 Chan. Cas. 172; 1 Eq. Cas. Abr. 65, pl. 4; 1 Dan. Ch. Pr. [* 3d Amer. Ed. 145]; [Lewis *v.* Yale, 4 Florida, 418.] The answer of a *feme* executrix shall not be read to charge the husband. 1 Eq. Cas. Abr. 227; Cole *v.* Gray, 2 Vern. 79.

[3] Rutter *v.* Baldwin, 1 Eq. Cas. Abr. 226. [And where a married woman claims as a respondent, in opposition to her husband, or lives separate from him, or disapproves of the defence which he wishes her to make, she may obtain an order of the Court for liberty to answer and defend the suit separately; and in such case her answer may be read against her. Story, Eq. Pl. § 71; *Ex parte* Halsam, 2 Atk. 50; Travers *v.* Bulkley, 1 Ves. 383; Jackson *v.* Haworth, 1 Sim. & Stu. 161; Wybourn *v.* Blount, 1 Dick. R. 155; Com. Dig. Chancery, K. 2. See also, Thorold *v.* Hay, 1 Dick. 410, and Carlton *v.* McKenzie, 10 Ves. 442.

[4] Codrington *v.* E. Shelburne, 2 Dick. 475. In several of the United States, it is enacted, that the answer of the defendant, discovering a concealment of the property of a judgment-debtor, to defraud his creditors, shall not be read in evidence against such defendant, in a criminal prosecution for the same fraud. See *New York*, Blatchford's Statutes, p. 307; Union Bank *v.* Barker, 3 Barb. Ch. R. 358; *Illinois*, Rev. Stat. 1845, ch. 21, §§ 36, 37; *Michigan*, Rev. Stat. 1846, ch. 90, §§ 27, 28; *Wisconsin*, Rev. Stat. 1849, ch. 84, §§ 10, 11; *Arkansas*, Rev. Stat. 1837, ch. 23, §§ 130, 132. In *Vermont*, the statute provides, that "the *answer* of the defendant in Chancery shall not be used as evidence to prove any fact therein stated, in any prosecution against such defendant for a crime or penalty." Verm. Rev. Stat. 1839, ch. 24, § 25. In *New York*, it is also enacted that "*no* pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading." Amend. Code, § 157. In *Iowa*, "no (*verified*) pleading can be used in a criminal prosecution against the party; nor can a party be compelled to state facts, which, if true, would subject him to a prosecution for *felony*." Code of 1851, § 1748. In *Virginia*, "evidence shall not be given against the accused, of any statement made by him as a witness upon a legal examination." Code of 1849, ch. 199, § 22. But it is perfectly clear, as a general rule of law, that no party or witness can be compelled to discover or to state any matter which may expose him to a criminal charge or penalty. *Ante*, Vol. 1, § 193, n.; Id. § 451; Story, Eq. Pl. §§ 575–578, 591–598; Wigram on Discovery, Pl. 130–133; Litchfield *v.* Bond, 6 Beav. 88; Adams *v.* Porter, 1 Cush. 170; 1 Dan. Ch. Pr. 626, 627; and notes by Perkins; Livingston *v.* Tompkins, 4 Johns. Ch. 432; Leggett *v.* Postley, 2 Paige, 599. And it is now well settled, that if a witness, claiming the protection of the Court, is obliged to answer in a matter tending to criminate himself; what he says must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him. Regina *v.* Garbett 2 C. & K. 474, 495; *Ante*, Vol. 1, § 451. The same principle, it is conceived, will apply to matters which the defendant has been compelled to disclose in his answer in Chancery. But where the defendant voluntarily answers, without obtaining the protection of the Court by demurring or otherwise, the answer may be read in evidence against him in a criminal prosecution,

§ 279. There are also *some exceptions to the rule in regard to the answer of an infant.* For after he comes of age he may be permitted to file a new answer, upon his affidavit that he now can make a better defence than before; but he is bound to do this, as he is in respect to the confirmation or avoidance of other acts of his infancy, within a reasonable time after his coming of age, and without *laches;* if, therefore, he unreasonably delays to apply for leave to make a better defence, he will be taken to have confirmed his former answer, and it may then be read against him.[1] And if the infant's father, being an heir-at-law, and of age, has by his answer in the original suit admitted the due execution of the will of his ancestor, but died before the cause was brought to an hearing, the answer may be read against the infant, as an admission of the will and sufficient to establish it.[2]

§ 280. But though, in general, the answer of an infant cannot be read against him, except as above stated, yet the rule is different in regard to idiots and persons of permanently weak intellects, and those who by reason of age or infirmity are reduced to a second infancy; their answer, which is made by guardian, being admitted to be read against them, as the answer of one of full age, made in person. The reason of the difference is said to be this, that as the infant improves in reason and judgment, he is to have a day to show cause, after he comes of age; but the case of the others being hopeless, and becoming worse and worse, they can have no day.[3]

Regina *v.* Goldshede, 1 C. & K. 657. And see *ante*, Vol. 1, §§ 193, 225, 226. [Although a defendant in equity is not bound to criminate himself or supply any link in the evidence by which a criminal prosecution may be sustained against himself, he may be compelled, in answer to a charge of fraud, to discover any act not amounting to a public offence or an indictable crime, although it may be one of great moral turpitude. Foss *v.* Haynes, 31 Maine, 81.

[1] Cecil *v.* Salisbury, 2 Vern. 224; Bennett *v.* Lee, 1 Dick. 89; 2 Atk. 487, 529; Stephenson *v.* Stephenson, 6 Paige, 353; Mason *v.* Debow, 2 Hayw. 178. [And where infants, defendants to a suit for partition of real estate, were above the age required by statute to authorize them to apply to the Court for the appointment of a guardian *ad litem*, and made such application, and a guardian was appointed, appeared, and answered, the answer was held regular and valid, and the Court took jurisdiction of the infant defendants, though the summons had not been served upon them. Vazian *v.* Stevens, 2 Duer, 635.]

[2] Lock *v.* Foote, 4 Sim. 132. [And where a respondent dies after answering a bill, leaving minor children who are made parties, the complainant may nevertheless use the answer, to the same extent as if the defendant were living. Robertson *v.* Parks, 3 Md. Ch. Decis. 65.]

[3] 1 Dan. Ch. Pr. 224, 225; Leving *v.* Canely, Prec. Ch. 229. And see 2 Johns. Ch. 235–237. [In Stanton *v.* Percival, 35 Eng. Law & Eq. Rep., it is laid down that the answer of the committee of a lunatic could not be read so as to bind the lunatic. But it was held, that, upon a bill of revivor against the personal representatives of the lunatic after her death, they being the committee who made the answer in the original suit, their original answer could be read against them.]

§ 281. In regard to the *reading of the answer in support of the plaintiff's case*, the *rule in Equity* is somewhat different from the rule at Law. For though, as we have heretofore seen,[1] when the answer of a defendant in Chancery is read against him, in an action at law, the defendant is entitled to have the whole read; yet in Courts of Equity the rule is, that "where a plaintiff chooses to read a passage from a defendant's answer, he reads all the circumstances stated in the passage; and if it contains a reference to any other passage, that other passage must be read also; but it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read, in which reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced, in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read."[2] Thus, where the passage read commenced with the words "before *such* demand was made," the plaintiff was ordered to read the passage immediately preceding, in which that demand was spoken of.[3] The defendant, also, may read any other passage in his answer, connected in meaning with that which the plaintiff has read.[4] The want of grammatical connection will not prevent another part from being read, if it is connected in meaning and is explanatory of the other; and, on the other hand, a merely grammatical connection, as, for example, by the particles *but* or *and*, will not entitle another part to be read, if it have no such explanatory relation.[5] It may here be added, that where the plaintiff, in reading a passage from a defendant's answer, has been obliged to read an allegation which makes against his case, he will be permitted to read other evidence, disproving such allegation.[6]

[1] *Ante*, Vol. 1, §§ 201, 202.

[2] Bartlett *v.* Gillard, 3 Russ. 157, per Ld. Eldon. And see Nurse *v.* Bunn, 5 Sim. 225; Colcott *v.* Maher, 2 Moll. 316; Ormond *v.* Hutchinson, 13 Ves. 53.

[3] Ibid.

[4] Rude *v.* Whitchurch, 3 Sim. 562; Skerrett *v.* Lynch, 2 Moll. 320.

[5] Davis *v.* Spurling, 1 Russ. & My. 64; Tam. 199, S. C.

[6] 2 Dan. Ch. Pr. 979 [* 3d Amer. Ed. 836]; Price *v.* Lytton, 3 Russ. 206. [* "The rule requiring the whole statement containing the admission to be taken together, prevails to a considerable extent in equity, but with respect to answers and examinations in Chancery, the equity rule is far less comprehensive than that which is recognized at common law, as if a party admits in his examination or answer that he received a sum of money and adds in the same sentence that he immediately paid it away, or states that a person gave him a sum, as a present, the charge and discharge will be so blended together that the one will not be admissible without the other; still, if he once admits the receipt of money as an independent fact, he cannot refer to other parts of his examination or answer, much less to affidavits sworn

§ 282. The *manner of statement* in the answer is sometimes *material to its effect*, as an admission against the defendant, dispensing with other proof. For a mere statement that the defendant *has been informed* that a fact is as stated, without expressing his *belief* of it, will not be regarded as an admission of the fact. But if he answer that he *believes*, or *is informed and believes*, that the fact is so, this will be deemed a sufficient admission of the fact, unless this statement is coupled with some qualifying clause, tending to the contrary; the general rule in Equity on this point being, that *what the defendant believes, the Court will believe.* But an exception to this rule has been admitted in regard to the belief of an heir-at-law of the due execution of a will by his ancestors; it being the course of the Court to require either a direct admission, or proof in the usual manner.[1]

[*The same is true with respect to the admission of the validity of a will by defendants who are not heirs at law.[2]]

§ 283. We have already seen, that generally, *the answer of one defendant cannot be read against another*, there being no issue between them, and, therefore, no opportunity for cross-examination; but that this rule does not apply to cases where the defendant claims through him whose answer is proposed to be read; nor to cases where they are jointly interested in the transaction in question, as partners, or are otherwise identified in interest.[3] So

by him, or to schedules attached to his answer, for the purpose of showing that he has liquidated the amount so admitted to have been received, by separate and independent payments. So, if a plaintiff reads a passage in the answer as evidence of a particular fact, the defendant cannot read other parts, even though grammatically connected with such passage by conjunctive particles, unless they be really explanatory of its meaning, and if, in order to understand the sense of the passage on which the plaintiff relies, it is necessary to read on the part of the defendant other portions of the answer, still these portions will be evidence only so far as they are explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction, will be considered as not read. This rule seems to have been adopted in consequence of the subtle contrivances of equity draftsmen; whose skill formerly consisted in so grammatically blending important points of the defendant's case with admissions that could not be withheld as to render it necessary that both should be read in conjunction, and thus to prove their client's case by means of his own unsupported statements." Taylor on Ev. Vol. 1, § 660; Ridgeway *v.* Darwin, 7 Ves. 404, per Ld. Eldon; Thompson *v.* Lamb, Ib. 588, per Id.; Robinson *v.* Scotney, 19 Ib. 584, per Sir Wm. Grant, M. R.; Davis *v.* Spurling, 1 Russ. & Myl., per Leach, M. R.; Bartlett *v.* Gillard, 3 Russ. 156, per Ld. Eldon; Freeman *v.* Tatham, 5 Hare, 329.]

[1] 2 Dan. Ch. Pr. 980 [* 3d Amer. Ed. 837]; Potter *v.* Potter, 1 Ves. 274. Whether this exception applies to an administrator's belief that a debt is due from the intestate, *quære;* and see Hill *v.* Binney, 6 Ves. 738.

[2] [* Davies *v.* Davies, 3 De Gex & Sm. 698.]

[3] *Ante*, Vol. 1, §§ 178, 180, 182; 2 Dan. Ch. Pr. 981, 982 [* 3d Amer. Ed. 838, 839], and cases in notes by Perkins. And see Crosse *v.* Bedingfield, 12 Sim. 35; [Gilmore *v.* Patterson, 36 Maine, 544; Blakeney *v.* Ferguson, 14 Ark. 641;

where the defendant, in his own answer, refers to that of his co-defendant for further information.[1] And though it is laid down as a general rule, that *the answer of one defendant cannot be read by another defendant* as evidence in his own favor;[2] yet the universality of this rule has been controverted; and it has been held, that where the answer in question is unfavorable to the plaintiff, and is responsive to the bill, by furnishing a disclosure of the facts required, it may be read as evidence in favor of a co-defendant; especially where the latter defends under the title of the former.[3]

§ 284. The *answer of the defendant* is not only evidence against him, but it may also, to a certain extent, and if sworn to, be read as *evidence in his favor*, sufficient, if not outweighed by opposing proof, to establish the facts it contains.[1] For it is to be observed,

Clayton *v.* Thompson, 13 Geo. 296; Powles *v.* Dilley, 9 Gill, 222; Winn *v.* Albert, 2 Md. Ch. Decis. 169.]

[1] Ibid.; Chase *v.* Manhardt, 1 Bland. 336; Anon., 1 P. Wms. 301; [Blakeney *v.* Ferguson, 14 Ark. 640. And where the right of the complainant to a decree against one defendant is only prevented from being complete by some questions between a second defendant and the former, he may read the answer of the second defendant for that purpose. Whiting *v.* Beebe, 7 Eng. (Ark.) 421.]

[2] 2 Dan. Ch. Pr. 981 (Perkins's ed.), and notes [* 3d Amer. Ed. 838]; [Morris *v.* Nixon, 1 How. U. S. 119; Farley *v.* Bryant, 32 Maine, 474; Gilmore *v.* Patterson, 36 Maine, 544; Cannon *v.* Norton, 14 Verm. 178.]

[3] Mills *v.* Gore, 20 Pick. 28. The decision in this case proceeded on the general ground, though the latter circumstance was also mentioned, as an independent reason. The language of the Court was as follows: "An answer of one defendant is not evidence against a co-defendant, for the plaintiff may so frame his bill and interrogatories, as to elicit evidence from one defendant to charge another, and to exclude such matters as might discharge him. To admit the answer of the one to be evidence again the other, under such circumstances, and when cross-interrogatories could not be admitted, would give to the plaintiff an undue advantage, against the manifest principles of impartial justice. But where the answer is unfavorable to the plaintiff, and consequently operates favorably for a co-defendant, the reason is not applicable. Where the plaintiffs call upon a defendant, for a discovery, requiring him to answer under oath fully to all the matters charged in the bill, they cannot be allowed to say that his answer is not testimony. And so was the decision in Field *v.* Holland, 6 Cranch, 8. In that case it was held, that the answer of Cox, one of the defendants, was not evidence against the other defendant, Holland, but that being responsive to the bill it was evidence against the plaintiff. And, besides, in the present case, the respondent Quincy has a right to defend himself under the title of Gore. He is but a depositary of the papers, and became such at the request of both parties. He has no interest in the question, but is bound to deliver the papers to the party having the title. The question of title is between the plaintiffs and the defendant Gore, and Gore's answer, being evidence for him in support of his title, is consequently evidence for the other defendant. So that in whatever point of view the objection may be considered, we think it quite clear that the answer in question, so far as it is responsive to the bill, is evidence to be weighed and considered; and that it is to be taken to be true, unless it is contradicted by more than one witness, or by one witness supported by corroborating circumstances, according to the general rule of equity. The answer in all respects, in relation to the question as to the delivery of the deed and note, is directly responsive to the allegations in the bill, and it expressly denies that the deed and note were ever delivered to the plaintiff Mills, as charged in the bill." 20 Pick. 34, 35; [Miles *v.* Miles, 32 N. H. 147; Powles *v.* Dilley, 9 Gill, 222.]

[1] Clason *v.* Morris, 10 Johns. 524, 542;

that the bill, though in part a mere pleading, is not wholly so; but where the older forms are still used, it is the examination of a witness by interrogatories. And in those States in which the interrogating part of the bill is now dispensed with, and the defendant is by the rules required to answer each material allegation in the bill as particularly as if specially interrogated thereto, the bill, it is conceived, partakes in all cases of the character both of a pleading and also of an examination of the defendant as a witness. The answer, too, so far as it sets up a new and distinct matter of defence, to defeat the equity of the plaintiff, is a mere pleading in the nature of a confession and avoidance at law; but when it only denies the facts on which the plaintiff's equity is founded, it is not only a pleading, but it is a pleading coupled with evidence. In all other respects, and so far as it is responsive to the bill, it is evidence; and the plaintiff, having thought fit to make the defendant a witness, is bound by what he discloses, unless it is satisfactorily disproved.[1] Nor is the answer in such case to be discredited, nor any presumption indulged against it, on account of its being the answer of an interested party.[2]

§ 285. The *test of the responsive character of the answer* is by ascertaining whether the questions answered would be proper to propound to a witness in a trial at law; whether they would be relevant to the complaint, and such as the witness would be bound to answer; and whether the answers would be competent testimony against the interrogating party.[3] Thus, the answer is held competent evidence for the defendant, of all those facts, a statement of which is necessary in order to make a full answer to the bill.[4] So, if an account is required by the bill, and is given in the answer, or is rendered to the master, and explained in answers to interrogatories put before him, the answers are responsive, and are competent evidence for the defendant.[5] So, if the bill sets forth only a part

Union Bank *v.* Geary, 5 Pet. 99; Daniel *v.* Mitchell, 1 Story, R. 172, 188; Adams, Doctr. of Equity, 21, 363 [Wharton's Notes]. In *Indiana*, it is enacted, that "Pleadings, sworn to by either party, in any case, shall not on the trial be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party than those not sworn to." Rev. Stat. 1852, Vol. 2, Part. 2, ch. 1, § 785, p. 205. [See also, *post*, § 289.]

[1] [* An answer of a defendant in Chancery, to be used against his co-defendant, must be under oath, and waiver by plaintiff of the oath does not render it thus admissible. Ayres *v.* Campbell, 9 Iowa, 213.]

[2] Clason *v.* Morris, 10 Johns. 542; Field *v.* Holland, 6 Cranch, 24; Woodcock *v.* Bennet, 1 Cowen, 743, 744, n.; Stafford *v.* Bryan, 1 Paige, 242; Forsyth *v.* Clark, 3 Wend. 643.

[3] Dunham *v.* Yates, 1 Hoffm. Ch. R. 185.

[4] Allen *v.* Mower, 17 Verm. 61.

[5] Powell *v.* Powell, 7 Ala. 582; Chaffin *v.* Chaffin, 2 Dev. & Bat. Ch. 255.

of the complainant's case, omitting the residue, and the omitted part is stated in the answer, thereby showing a different case from that made by the bill, and not merely by way of confession and avoidance, it is evidence in the cause.[1] And hence, where a bill, for the specific performance of a contract in writing, called on the defendant to answer as to the making of the contract, the execution of the instrument, how it was disposed of, and when, where, and how the defendant obtained possession of it, and under what pretences; it was held, that the allegations in the answer, setting up an agreement to rescind the contract, were responsive to the bill, and were evidence for the defendant.[2]

§ 286. Regularly, in proceedings in Chancery, the defendant's answer is *under oath, unless the plaintiff chooses to dispense with it;* in which case he moves the Court for an order to that effect; which, if the defendant is under no incapacity, such as infancy, or the like, is ordinarily granted.[3] If the parties agree, the order is granted of course; and if the plaintiff files a replication to an answer not sworn to, this is evidence of a waiver of the oath.[4] *Where*

[1] Schwarz *v.* Wendell, Walk. Ch. 267.

[2] Woodcock *v.* Bennet, 1 Cowen, R. 711. [Where the bill set out the making of a contract, alleged its loss, and treated it as a contract in force, it was held that this did not permit that an averment of its cancellation by the respondents in their answer, should be considered as evidence. Sheldon *v.* Sheldon, 3 Wis. 699. So where a bill, brought to procure settlement of a partnership account, did not allege any settlement, but the answer set forth a full accounting and settlement, it was held that this was not responsive to the bill, and could not be considered as evidence, but that coming in by way of defence, it must be regarded in the nature of a plea. Spaulding *v.* Holmes, 25 Vt. 491. Nor can the answer, though responsive and uncontradicted, be taken to establish anything in bar of the relief prayed for, which parol testimony would not be admitted to prove, for it is as evidence only that it is received. Winn *v.* Albert, 2 Md. Ch. Decis. 169. And when the complainant filed his bill to reform a deed given by him, alleging that by the deed one hundred feet were conveyed on a certain street, whereas it should have conveyed thirty feet only, and the respondent in his answer admitted that there was a mistake in the deed, but "affirmed" that the deed should have conveyed thirty-two feet, it was held, that it would seem that the respondent must establish this allegation by independent evidence. Busby *v.* Littlefield, 33 N. H. 76. See also Parkes *v.* Gorton, 3 R. I. 27.

But where the answer of the respondent admitted the indebtedness originally as charged in the bill, but alleged payment; such answer being responsive to the allegations and interrogatories of the bill, it is at least *primâ facie* evidence for the party making it, if it is not absolute proof of the facts stated, so as to require the usual countervailing proof in cases necessary to outweigh an answer in Chancery. King *v.* Poyan, 18 Ark. 583. See also Hinkle *v.* Wanzer, 17 How. U. S. 353.]

[3] Cooper, Eq. Pl. 325; Story, Eq. Pl. § 874; 2 Dan. Ch. Pr. 846 [* 3d Amer. Ed. 748, 749, and notes].

[4] Fulton Bank *v.* Beach, 6 Wend. 36; 2 Paige, 307, S. C. By the present Code of Practice in *New York*, if the plaintiff makes oath to his complaint, the defendant is bound to put in his answer under oath; but the verification to the answer may be omitted, when an admission of the truth of the allegations might subject the party to prosecution for felony. Amended Code, § 157; Hill *v.* Muller, 8 N. Y. Leg. Obs. 90; Swift *v.* Hosmer, 6 N. Y. Leg. Obs. 317; 1 Code Rep. 26, S. C.; Alfred *v.* Watkins, 1 Code Rep. 343, N. S. If the defendant verifies his answer by oath, all the subsequent pleadings must be verified in like manner, whether the complaint is verified or not. Lin *v.* Jaquays,

*the answer is not sworn to*, its effect and value, as evidence in the cause, is a point on which, in this country, some difference of opinion has been expressed. The rule in England, as held by Lord Eldon, was that the defendant's answer without oath gave the same authority to the Court to look at the circumstances, denied or admitted in the answer so put in, for the purpose of administering civil justice between the parties, as if it was put in

2 Code Rep. 29; Levi *v.* Jakeways, Id. 69; Code, *ubi supra*.

[In *Massachusetts*, by the fifth rule of Chancery Practice, "When a bill shall be filed other than for discovery only, the complainant may waive the necessity of the answer being made on the oath of the defendant; and in such case the answer may be made without oath, and shall have no other or greater force as evidence than the bill. No exception for insufficiency can be taken to such answer." In Bingham *v.* Yeomans, 10 Cush. 58, it was decided that this waiver must be made by the complainant in his bill before answer, and that he cannot do it afterwards. The whole case was thus stated by Shaw, C. J.: "This is a bill in equity against a mortgagee, to redeem a mortgage, and praying for an account. The bill is in the usual form, not waiving the respondent's oath; to which a sworn answer was duly made. When the case came before the Judge at *nisi prius*, the complainant moved to waive the requirement of a sworn answer, and that the respondent's answer might be stricken out. The motion was overruled, and the question reserved for the whole Court.

"If the complainant in equity would waive an answer on oath, as he may do under the fifth rule of chancery practice, he must do it by his bill and before answer. In that case, the respondent may make his answer with reference solely to his own grounds of defence, and without regard to the interrogating part of the bill; and to such answer there can be no exception taken. Or, the complainant might require an answer on oath, as he does if not waived, and compel a full discovery under a severe penalty; but having done so, the respondent is by law entitled to the benefit of his answer as evidence, so far as responsive. If it were otherwise, the effect would be, that after a sworn answer filed, the complainant might speculate on the relative advantage or disadvantage, on the one hand, of benefit to himself of the discoveries, and, on the other, of benefit to the defendant of his answer, as evidence, and admit or reject it accordingly, at his own election. This would be an unfair advantage, and inequitable; and the Court are of opinion that the motion of the complainant to strike out the oath from the respondent's answer was rightly overruled." In Chace *v.* Holmes, 2 Gray, 431, it was held, that the complainant who had not waived the oath of the respondent in his bill, could not do so after a demurrer had been filed by the respondent and then withdrawn.

In Gerrish *v.* Towne, 3 Gray, 91, the complainant in his bill waived the oath of the respondent to his answer. The respondent, notwithstanding this express waiver, answered under oath. The complainant, without moving the Court for the cancellation of the oath, filed a general replication. It was held, that though a general replication waves all insufficiencies and defects in the answer, yet that it does not at all affect the question of its competency as proof of the facts and statements it contains; and that such is the necessary effect of the rule itself, the provision being that when the complainant waives the answer on oath, "the answer *may* be made without oath, and *shall* have no other or greater force as evidence than the bill."

In *Maryland*, under the Act of 1852, ch. 133, if the bill does not require the answer on oath, the answer of the respondent on oath is not evidence against the complainant. Winchester *v.* Baltimore, &c. R. R., 4 Md. 231. In *Indiana*, if the complainant waive the respondent's oath to his answer, pursuant to the statute, the effect of the denial in the answer is to require the allegations in the bill to be sustained by a preponderance of evidence. Moore *v.* McClintock, 6 Ind. 209. In such case, two witnesses are not required to prove the matter put in issue by the denial in the answer, but the evidence of one witness is entitled to the same weight as it would have in establishing the affirmative of an issue in law. Peck *v.* Hunter, 7 Ib. 295; Larsh *v.* Brown, 3 Ib. 234. In *Iowa*, a defendant in equity may answer under oath, although the bill expressly waives it, and such answer will be received in evidence. Armstrong *v.* Scott, 3 Iowa, 433.]

upon the attestation of an oath.[1] In a case in the Supreme Court of the United States, which was an injunction bill, filed upon the oath of the complainant, to which an answer, by a corporation, was put in without oath, the question was as to the amount of evidence necessary to outweigh the answer. The Court said, that the weight of such answer was very much lessened, if not entirely destroyed, as matter of evidence, when not under oath; and, indeed, that they were inclined to adopt it as a general rule, that an answer not under oath, is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations. But the cause was not decided on this ground, there being sufficient circumstances in the case, corroborating the testimony of the opposing witness, to outweigh the answer, even if it had been sworn to.[2] And Mr. Chancellor Walworth, in a case before him, is reported to have held, that an answer, not sworn to, was not of any weight as evidence in the cause.[3] But Mr. Justice Story, speaking of such an answer, was of opinion, that it is by no means clear that it is not evidence in favor of the defendant as to all facts, which are not fully disproved by the other evidence and circumstances in the case, nor clear that it ought not to prevail, where the other evidence is either defective, obscure, doubtful, or unsatisfactory. And it may well be suggested, he adds, whether the plaintiff has a right to dispense with the oath, and yet to make the answer evidence in his own favor as to all the facts which it admits, and exclude it in evidence as to all the facts which it denies.[4]

[1] Curling *v.* Townsend, 19 Ves. 628. This was an application by the defendant for leave to file a supplemental answer; in other words, to deprive the plaintiff of the benefit to which he was entitled from the answer which was already on the record, but was without oath. 2 Dan. Ch. Pr. 848 [*3d Amer. Ed. 750].

[2] Union Bank of Georgetown *v.* Geary, 5 Pet. 99, 112. [See *ante*, § 277, note.]

[3] Bartlett *v.* Gale, 4 Paige, 503. And see, accordingly, Willis *v.* Henderson, 4 Scam. 13. In some of the United States it is enacted, that when the plaintiff waives his right to a sworn answer, the answer shall have no more weight as evidence than the bill. See *Michigan*, Rev. Stat. 1846, ch. 90, § 31; *Illinois*, Rev. Stat. 1845, ch. 21, § 21. See also *Massachusetts*, Reg. Gen. in Chan. 24 Pick. 411, Reg. 5. If the defendant is entitled, by the rules of law, to have his answer considered in evidence, though not sworn too, the question has sometimes been raised, whether the Court can, by any rule of practice, exclude it.

[4] Story, Eq. Pl. § 875 *a*. Subsequently to the publication of the work here cited, the same point was adverted to by Mr Justice Wayne, in delivering the opinion of the Court in Patterson *v.* Gaines, 6 How. S. C. R. 588; in which he cited and reaffirmed the observations of the learned Judge in 5 Pet. 112, above quoted, and also that of Mr. Chancellor Walworth, in Bartlett *v.* Gale, *supra*. But here, too, the point was not raised in argument, nor was it judicially before the Court, the testimony of the opposing witness being, as the Judge remarked, so strongly corrob-

[*It seems to be settled in the practice of some of the American States, that although the statute allow the plaintiff, in a bill in Equity, to dispense with the oath of the defendant in his answer; and that in such cases the answer will be sufficient in all ordinary cases, without oath; yet it will be requisite, in order to sustain a motion to dissolve an injunction, that the answer should be sworn to.[1] There can be no question upon principle, it would seem, that the answer of the defendant not upon oath, although responsive to the bill, is to be treated merely in the nature of a plea of denial, by way of special traverse. And it would be of the same effect precisely, if it were a mere general issue. We somewhat marvel that any Judge, or text writer, could ever have entertained any serious doubt in regard to this. It must arise from the general practice of Courts of Equity not to decree relief upon a bill which was flatly denied by the respondent upon oath, and only sustained by the oath of one witness. It consequently becomes almost matter of course, to allow that extent of force to the answer, *per se*, not reflecting always, whether it is to the answer, as testimony or as a pleading. But a moment's consideration must convince all, that this effect results from the answer, as counter evidence only. It is upon the same ground, that no weight is to be attached to the answer of a defendant, as executor, or in an official capacity, or as agent of a corporation, or in any form, where not purporting to be made upon personal knowledge. This view is strongly confirmed by the opinions of Lord Eldon,[2] Thompson, J.,[3] and Chancellor Walworth.[4]]

§ 287. The *general rule* that the defendant's answer, responsive to the bill, is evidence in his favor, is *subject to several limitations and exceptions*. For though, *in form*, it is *responsive* to an interrogatory in the bill, yet, if it involves also, affirmatively, the assertion of a right, in opposition to the plaintiff's demand, it is but mere pleading, and is therefore not sufficient to establish the right so asserted.[5] The answer, also, must not be evasive; it must be direct

orated by other proofs, that the answer would be disproved, if it had been sworn to. The attention of the Court does not seem to have been drawn to the doubt suggested by Mr. Justice Story. In Babcock *v.* Smith, 22 Pick. 61, 66, the question whether the depositions of co-defendants were admissible for each other where the plaintiff had waived the oath to their answers was raised, but not decided.

[1] [* Mahaney *v.* Lazier, 16 Md. 69.

[2] Curling *v.* Townsend, 19 Ves. 628, 629.

[3] Union Bank of Georgetown *v.* Geary, 5 Peters, R. 99, 110–112.

[4] Smith *v.* Clarke, 4 Paige, R. 368.]

[5] Payne *v.* Coles, 1 Munf. 373; Clarke *v.* White, 12 Pet. 178, 190; [Miles *v.* Miles, 32 N. H. 147; Busley *v.* Littlefield, 33 Ib. 76; Spaulding *v.* Holmes, 25 Vt. 491;

and positive, or so expressed as to amount to a direct and positive denial or affirmation of the facts distinctly alleged and charged or denied in the bill, in order to have weight as evidence in his own favor, in regard to those facts.[1] And this is especially true as to facts charged in the bill as being the acts of the defendant, or within his personal knowledge.[2] If, however, they are such, that it is probable he cannot recollect them so as to answer more positively, a denial of them according to his knowledge, recollection, and belief, will be sufficient.[3] And no particular form of words is necessary; it being sufficient if the substance is so.[4] But if the defendant professes a want of knowledge of the facts alleged in the bill, the answer is not evidence against those allegations, even though he also expressly denies them.[5] So, if the fact asserted by the defendant is such, that it is not and cannot be within his own knowledge, but is in truth only an expression of his strong conviction of its existence, or is what he deems an infallible deduction from facts which were known to him; the nature of his testimony cannot be changed by the positiveness of his assertion, and therefore the answer does not fall within the rule we are considering.[6] The answer of an infant, also, by his guardian, *ad litem*, though it be responsive to the bill, and sworn to by the guardian, is not evidence in his favor; for it is regarded as a mere pleading, and not as an examination for the purpose of discovery.[7]

Ives *v.* Hazard, 4 R. I. 14; Fisler *v.* Porch, 2 Stockt. 243; Dean *v.* Moody, 31 Miss. 617; Roberts *v.* Totten, 8 Eng. 609; Pugh *v.* Pugh, 9 Ind. 132; Hunt *v.* Thorn. 2 Mich. 213; Smith *v.* Potter, 3 Wis. 432.]

[1] Dan. Ch. Pr. 830, 831, 984, and notes by Perkins [*3d Am. Ed. 736, 737, 841, 842]; Wilkins *v.* Woodfin, 5 Munf. 183; Sallee *v.* Duncan, 7 Monr. 382; Hutchinson *v.* Sinclair, Id. 291. And see McGuffie *v.* Planter's Bank, 1 Freem. Ch. 383; Amos *v.* Heatherby, 7 Dana, 45; [Stouffer *v.* Machen, 16 Ill. 553; Dinsmoor *v.* Hazelton, 2 Foster, 535.]

[2] Hall *v.* Wood, 1 Paige, 404; Sloan *v.* Little, 3 Paige, 103; Knickerbacker *v.* Harris, 1 Paige, 209, 212.

[3] Ibid.

[4] Utica Ins. Co. *v.* Lynch, 3 Paige, 210.

[5] Drury *v.* Connor, 6 H. & J. 288; Bailey *v.* Stiles, 2 Green, Ch. 245; McGuffie *v.* Planter's Bank, 1 Freem. Ch. 383; Town *v.* Needham, 3 Paige, 546; Dunham *v.* Gates, 1 Hoffm. Ch. R. 185; Whittington *v.* Roberts, 4 Monr. 173; The State *v.* Halloway, 8 Blackf. 45; [Loomis *v.* Fay, 24 Vt. 240; Wooley *v.* Chamberlain, Ib. 270.]

[6] Clark *v.* Van Riemsdyk, 9 Cranch, 160, 161; Pennington *v.* Gittings, 2 G. & J. 208. And see Copeland *v.* Crane, 9 Pick. 73; Garrow *v.* Carpenter, 1 Port. 359; Waters *v.* Creagh, 4 Stew. & Port. 310; Lawrence *v.* Lawrence, 4 Bibb. 357; Harlan *v.* Wingate, 2 J. J. Marsh. 138; Hunt *v.* Rousmanier, 3 Mason, 294; Fryrear *v.* Lawrence, 5 Gilm. 825; Dugan *v.* Gittings, 3 Gill, 138; Newman *v.* James, 12 Ala. 29. [Where an answer, although responsive to the bill, denies circumstances to be fraudulent as alleged, yet contains statements from which no reasonable doubt can be entertained of fraud, the circumstances of the answer will destroy the effect of its denial. Wheat *v.* Moss, 16 Ark. 243.]

[7] Bulkley *v.* Van Wyck, 5 Paige, 536. [*Chaffin *v.* Kimball, 23 Ill. 36] And see Stephenson *v.* Stephenson, 6 Paige, 353. [See *ante*, § 278, and notes.]

§ 288. But in order that the answer may be evidence for the defendant, it is *not always necessary that it should be responsive to the bill;* for where no replication has been put in, and the cause is heard upon the bill, answer, and exhibits, the answer is considered true throughout, in all its allegations, and whether responsive or not; upon the plain and obvious principle that the plaintiff, by not filing a replication and thereby putting the facts in issue, has deprived the defendant of the opportunity to prove them.[1] And if, after a replication is filed, the cause is set down for a hearing on the bill and answer, by the plaintiff, or by consent, the answer is still taken as true, notwithstanding the replication.[2] And where the defendant states only that he believes, and hopes to be able to prove, the facts alleged in the answer, the same rule prevails, and the facts so stated are taken for truth.[3] If, where the cause is heard upon bill and answer, it appears that the plaintiff is entitled to a decree, he must take it upon the qualifications stated in the answer.[4]

§ 289. Subject to the preceding qualifications and exceptions, the known *rule in Equity*, as before intimated,[5] is "that an answer, which is responsive to the allegations and charges made in the bill, and contains clear and positive denials thereof, must prevail; unless it is overcome by the testimony of two witnesses to the substantial facts, or at least, by one witness, and other attendant circumstances which supply the want of another witness, and thus destroy the statements of the answer, or demonstrate its incredi-

[1] 2 Dan. Ch. Pr. 1188, 1189 [*3d Amer. Ed. 998]; Id. 984, and note by Perkins [*3d Amer. Ed. 839–843]; Dale *v.* McEvers, 2 Cowen, 118, 126. And see Barker *v.* Wyld, 1 Vern. 139; Kennedy *v.* Baylor, 1 Wash. 162; Pierce *v.* West, 1 Pet. C. C. R. 351; Slason *v.* Wright, 14 Verm. 208; Leeds *v.* Marine Ins. Co., 2 Wheat. 380. In *Arkansas*, it is enacted that "when any complainant shall seek a discovery respecting the matters charged in the bill, the disclosures made in the answer shall not be conclusive, but, if a replication be filed, may be contradicted or disproved, as other testimony, according to the practice of Courts of Chancery." Rev. Stat. 1837, ch. 23, § 49. So is the law in *Missouri*, Rev. Stat. 1845, ch. 137, § 30. And in *Illinois*, Rev. Stat. 1845, ch. 21, § 33. In *Ohio*, it is enacted that, at a hearing on bill and answer, the answer may be contradicted by matter of record referred to in the answer, but not otherwise. Rev. Stat. 1841, ch. 87, § 31. So also is the statute law in *New Jersey*, Rev. Stat. 1846, tit. 33, ch. 1, § 38. And in *Missouri*, Rev. Stat. 1845, ch. 137, § 29. And in *Illinois*, Rev. Stat. 1845, ch. 21, § 32. [Gates *v.* Adams, 24 Vt. 70; Warren *v.* Twiley, 10 Md. 39; Lampley *v.* Weed, 27 Ala. 621; Gwin *v.* Selby, 5 Ohio, N. S. 97;] [*Perkins *v.* Nichols, 11 Allen, 544.]

[2] Moore *v.* Hylton, 1 Dev. Ch. 429; Carman *v.* Watson, 1 How. Miss R. 333; Reece *v.* Darley, 4 Scam. 159; [White *v.* Crew, 16 Geo. 416; Coulson *v.* Coulson, 5 Wis. 79.] [*And when a case in equity is set down for hearing on the defendant's plea, evidence previously taken by the defendant cannot be considered by the court. Hancock *v.* Carlton, 6 Gray, 39.]

[3] Brinckerhoff *v.* Brown, 7 Johns. Ch. 217, 223.

[4] Doolittle *v.* Gookin, 10 Verm. 265.

[5] *Supra*, § 277. And see *ante*, Vol. I, § 260.

bility or insufficiency as evidence."[1] From the manner in which this rule is stated both here and elsewhere, it might at first view

[1] Daniel *v.* Mitchell, 1 Story, R. 172, 188, per Story, J.; Lenox *v.* Prout, 3 Wheat. 520. And see 2 Dan. Ch. Pr. 983, and cases in Mr. Perkins's note [*3d Amer. Ed. 840]; 2 Story, Eq. Jur. § 1528. In *Iowa*, every pleading required to be made under oath, if sworn to by the party himself, is considered as evidence in the cause, of equal weight with that of a disinterested witness. Rev. Code, 1851, § 1745; and every affirmative allegation duly pleaded in the petition, if not responded to in the answer, is taken as true. Id. § 1742. But an answer, though responsive to the bill, and denying its charges, and not outweighed by two opposing witnesses, or by one witness and other equivalent testimony, is not conclusive upon a Jury. Hunter *v.* Wallace, 1 Overton, 239. In *Indiana*, it is enacted, that pleadings, sworn to by either party, in any case, shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party, than those now sworn to. Rev. Stat. 1852, Part 2, ch. 1, § 75. In *Mississippi*, the rule, requiring more than one witness to overthrow an answer in Chancery, is abolished in all cases where the bill is sworn to by the complainant; and it is enacted, that the answer shall in no case receive greater weight and credit, upon the hearing, than, in view of the interest of the party making it, and the circumstances of the case, it may be fairly entitled to. Stat. Feb. 15, 1838, § 6; Ald. & Van Hoes Dig. p. 847. In *Arkansas*, the answer to a bill of discovery is not conclusive; but on filing a replication, the plaintiff may contradict or disprove it, as in other cases, according to the course of practice in Chancery. Rev. Stat. 1837, ch. 23, § 49. In *Michigan*, in bills other than for discovery, the plaintiff may waive the defendant's oath as to the answer; in which case the answer may be made without oath, and shall have no other or greater force, as evidence, than the bill. Rev. Stat. 1846, ch. 90, § 31. In *Alabama*, the law is the same. Code of Alabama (1852), § 2877. It is also the same in *Illinois*. Rev. Stat. 1845, ch. 21, § 21. In Carpenter *v.* Prov. Wash. Ins. Co., 4 How. S. C. R. 185, the rule stated in the text was reviewed and commented on, by Woodbury, J. "Where an answer," he observed, "is responsive to a bill, and like this, denies a fact unequivocally and under oath, it must, in most cases, be proved not only by the testimony of one witness, so as to neutralize that denial and oath, but by some additional evidence, in order to turn the scales for the plaintiff. Daniel *v.* Mitchell, 1 Story, Rep. 188; Higbie *v.* Hopkins, 1 Wash. C. C. R. 230; The Union Bank of Georgetown *v.* Geary, 5 Peters, 99. The additional evidence must be a second witness, or very *strong circumstances*." Wash. C. C. R. 230; Hughes *v.* Blake, 1 Nason, C. C. R. 514; 3 Gill & Johns. 425; 1 Paige, 239; 3 Wend. 532; 2 Johns. Ch. R. 92. Clark's Ex'rs *v.* Van Riemsdyk, 9 Cranch, 153, says, 'with pregnant circumstances.' Neale *v.* Hagthorp, 3 Bland's Ch. 567; 2 Gill & Johns. 208. But a part of the cases on this subject introduce some qualifications or limitations to the general rule, which are urged as diminishing the quantity of evidence necessary here. Thus, in 9 Cranch, 160, the grounds of the rule are explained; and it is thought proper there, that something should be detracted from the weight given to an answer, if from the nature of things the respondent could not know the truth of the matter sworn to. So, if the answer do not deny the allegation, but only express ignorance of the fact, it has been adjudged that one positive witness to it may suffice. 1 J. J. Marshall, 178. So, if the answer be evasive or equivocal, 4 J. J. Marshall, 213; 1 Dana, 174; 4 Bibb. 358. Or if it do not in some way deny what is alleged. Knickerbocker *v.* Harris, 1 Paige, 212. But if the answer, as here, explicitly denies the material allegation, and the respondent, though not personally conusant to all the particulars, swears to his disbelief in the allegations, and assigns reasons for it, the complainant has, in several instances, been required to sustain his allegation by more than the testimony of one witness. (3 Mason's C. C. R. 294.) In Coale *v.* Chase, 1 Bland, 136, such an answer and oath by an administrator, was held to be sufficient to dissolve an injunction for matters alleged against this testator. So it is sufficient for that purpose if a corporation deny the allegation under seal, though without oath (Haight *v.* Morris Aqueduct, 4 Wash. C. C. R. 601); and an administrator denying it under oath, founded on his disbelief, from information communicated to him, will throw the burden of proof on the plaintiff beyond the testimony of one witness, though not so much beyond as if he swore to matters within his personal knowledge. 3 Bland's Ch. 567, note; 1 Gill & Johns. 270; Pennington *v.* Gittings, 2 Gill & Johns. 208. But what seems to go further than is necessary for this case, it has been adjudged, in Salmon

appear as though the testimony of *a witness* were indispensable, and that documentary evidence, however weighty, would not alone suffice to counterpoise the answer. But it is not so. The rule, when stated as above, applies particularly to the case of an answer, opposed only by the testimony of one witness; in which case the Court will neither make a decree, nor send it to a trial at law.[1] But if there is sufficient evidence in the cause to outweigh the force of the answer, the plaintiff may have a decree in his favor. This sufficient evidence may consist of one witness, with additional and corroborative circumstances; and these circumstances may sometimes be found in the answer itself;[2] or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge.[3] Thus, on the one hand, it has

*v.* Clagett, 3 Bland, 141, 165, that the answer of a corporation, if called for by a bill, and it is responsive to the call, though made by a 'corporation aggregate, under its seal, without oath,' is competent evidence, and 'cannot be overturned by the testimony of one witness alone.' We do not go to this extent, but see no reason why such an answer, by a corporation, under its seal, and sworn to by the proper officer, with some means of knowledge on the subject, should not generally impose an obligation on the complainant to prove the fact by more than one witness. (5 Peters, 111; 4 Wash. C. C. R. 601.)" See 4 How. S. C. R. 217–219. [* In California the answer is only a pleading, and is not evidence for defendant. Bostic *v.* Love, 16 Cal. 69.]

[1] Pember *v.* Mathers, 1 Bro. Ch. R. 52.

[2] Pierson *v.* Catlin, 3 Verm. 272; Maury *v.* Lewis, 10 Yerg. 115. And see Freeman *v.* Fairlie, 3 Mer. 42. For cases illustrative of the nature and amount of the corroborative testimony required, in addition to one witness, to outweigh the answer, see Only *v.* Walker, 3 Atk. 407; Morphett *v.* Jones, 1 Swanst. 172; Biddulph *v.* St. John, 2 Sch. & Lefr. 532; Lundsday *v.* Lynch, Id. 1; Piling *v.* Armitage, 12 Ves. 78.

[3] Long *v.* White, 5 J. J. Marsh. 228; Gould *v.* Williamson, 8 Shepl. 273; Clark *v.* Riemsdyk, 9 Cranch, 153. In this case, the doctrine on this subject was expounded by Marshall, C. J., in the following terms: "The general rule, that either two witnesses, or one witness, with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness. The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say that John Innes Clark never gave Benjamin Monro authority to take up money or to draw bills; when they assert that Riemsdyk, who was at Batavia, did not take this bill on the credit of the owners of The Patterson, but on the sole credit of Benjamin Monro, they assert facts which cannot be within their own knowledge. In the first instance they speak from belief; in the last they swear to a deduction which they make from the admitted fact that Monro could show no written authority. These traits in the character of testimony must

been held, that if the answer be positive, denying the charge in the bill, it ought not to be overthrown by evidence *less* positive, *though* it proceed from the mouth of two witnesses;[1] and that if the answer be improbable, yet, if it is not clearly false, it will be conclusive in favor of the defendant, in the absence of any opposing proof.[2] On the other hand, it has been held, that the force of the answer to a bill of *discovery* may be impeached by evidence showing directly that *the defendant* is not to be believed.[3] So, if the fact is denied upon belief only; unless the grounds of belief are also disclosed, and are deemed sufficient;[4] or, if the fact is denied equivocally, indistinctly, or evasively, in the answer;[5] or, if the denial is mixed up with a recital of circumstances inconsistent with the truth of the denial;[6] or, if the answer is made by a corporation, under its seal, and without oath;[7] the testimony of one witness may be sufficient against it. But a positive answer, responsive to the bill, is not outweighed by the proof of facts which may be reconciled with the truths of the statements or denials in the answer;[8] nor by the proof of the mere admissions of the defendant, contradictory to the answer, unless they appear to have been deliberately and considerately made.[9] Very little reliance, it is said, ought to be placed upon loose conversations or admissions of the party, to overbalance his solemn denial, on oath, in his answer.[10]

be perceived by the Court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition. The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what, in the nature of things, they could not know, cannot give to their answer more effect than it would have been entitled to, had they been more circumspect in their language." 9 Cranch, 160, 161. See also Watts *v.* Hyde, 12 Jur. 661.

The rule requiring the testimony of two witnesses, or its full equivalent, was borrowed from the rule of the Roman Civil Law, — *Responsio unius non omninò audiatur.* But the strictness with which the rules of that law were formerly observed in Courts of Equity has very much abated in modern times, and the rule in question is now placed on the principle above stated by Marshall, C. J. It hence appears that these Courts no longer recognize the binding force of the Civil Law, even in proceedings which, in general, are according to the course of that law; but govern themselves by the principles and rules of the Common Law, in all cases to which these principles and rules can apply; agreeably to the maxim — *æquitas sequitur legem.*

[1] Auditor *v.* Johnson, 1 Hen. & Munf. 536.

[2] Jackson *v.* Hart, 11 Wend. 343.

[3] Miller *v.* Talleson, 1 Harp. Ch. 145. And see Dunham *v.* Yates, 1 Hoffm. Ch. R. 185.

[4] Hughes *v.* Garner, 2 Y. & C. 328; Copeland *v.* Crane, 9 Pick. 73, 78; Hunt *v.* Rousmanier, 3 Mason, 294.

[5] Phillips *v.* Richardson, 4 J. J. Marsh. 212. And see Brown *v.* Brown, 10 Yerg. 84; Farnam *v.* Brooks, 9 Pick. 212; Martin *v.* Green, 10 Miss. 652.

[6] Barraque *v.* Siter, 4 Eng. 545.

[7] Van Wyck *v.* Norvell, 2 Humph. 192; Lovett *v.* Steam Saw-Mill Co., 6 Paige, 54; *sed quære*, and see 4 How. S. C. R. 218, 219, *semb. contra.*

[8] Branch Bank *v.* Marshall, 4 Ala. 60.

[9] Hope *v.* Evans, 1 Sm. & M. 195; Petty *v.* Taylor, 5 Dana, 598. It has been held, that the testimony of two witnesses to two distinct conversations, is not sufficient. Love *v.* Braxton, 5 Call. 537.

[10] Flagg *v.* Mann, 2 Sumn. 486, 553, 554, per Story, J.; Hine *v.* Dodd, 2 Atk. 275.

§ 290. The *effect* thus given to the answer is *limited* to those parts of it which are *strictly responsive to the bill;* it being only where the plaintiff has directly appealed to the conscience of the defendant, and demanded of him the disclosure of a particular matter of fact, that he is bound to receive the reply for truth, until he can disprove it. If, therefore, the defendant, in addition to his answer to the matter concerning which he is interrogated by the plaintiff, sets up other facts by way of defence, his *answer is not evidence for him, in proof of such new matter*, but it must be proved *aliundè*, as an independent allegation.[1] We have already seen,[2] that the rule of the Common Law on this subject is different from the rule in Equity; it being required in Courts of Law, when the

[1] 2 Dan. Ch. Pr. 983, 984, and notes by Perkins [*3d Amer. Ed. 840, 841]; 2 Story, Eq. Jur. § 1529; 2 Story, Eq. Pl. § 849 *a*; Hart *v.* Ten Eyck, 2 Johns. Ch. 62. In this case, the rule was thus stated and explained by the learned Chancellor *Kent:* "It appears to me, that there is a clear distinction, as to proof, between the *answer* of the defendant and his examination as a *witness*. At any rate, the question how far the matter set up in the answer can avail the defendant, without proof, is decidedly and rationally settled. The rule is fully explained in a case before Lord Ch. Cowper, in 1707, reported in Gilbert's Law of Evidence, p. 45. It was the case of a bill by creditors against an executor, for an account of the personal estate. The executor stated in his answer that the testator left £1,100 in his hands, and that, afterwards, on a settlement with the testator, he gave his bond for £1,000, and the other £100 was given him by the testator as a gift for his care and trouble. There was no other evidence in the case of the £1,100 having been deposited with the executor. The answer was put in issue, and it was urged that the defendant having charged himself, and no testimony appearing, he ought to find credit where he swore in his own discharge. But it was resolved by the Court, that when an answer was put in issue, *what was confessed and admitted by it, need not be proved;* but that the defendant must make out, *by proof*, what was insisted on by way of avoidance. There was, however, this distinction to be observed, that where the defendant admitted a fact, and insisted on a *distinct* fact by way of avoidance, he must prove it, for he may have admitted the fact under an apprehension, that it could be proved, and the admission ought not to profit him, so far as to pass for truth, whatever he says in avoidance. But if the admission and avoidance had consisted of one *single fact*, as if he had said the *testator had given him* £100, the whole must be allowed, unless disproved. This case is cited by Peake (Ev. 36, *in notis*), to show a distinction, on this subject, between the rule at Law and Equity, and that in Chancery one part of an answer may be read against the party without reading the other; and that the plaintiff may select a particular admission, and put the defendant to prove other facts. He preferred, as he said, the rule at law, that if part of an answer is read, it makes the whole answer evidence, and even Lord Hardwicke, in one of the cases I have cited, thought the rule of law was to be preferred, provided the Courts of Law would not require equal credit to be given to every part of the answer. On the above doctrine, in the case of Gilbert, I have to remark, in the first place, that it is undoubtedly the long and well-settled rule in Chancery, whatever may be thought of its propriety. Lord H. says, in the case of Talbot *v.* Rutledge, that if a man admits, by his answer, that he received several sums of money at particular times, and states that he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness. But, in the next place, I am satisfied that the rule is perfectly just, and that a contrary doctrine would be pernicious, and render it absolutely dangerous to employ the jurisdiction of this Court, inasmuch as it would enable the defendant to defeat the plaintiff's just demands, by the testimony of his own oath, setting up a discharge or matter in avoidance." 2 Johns. Ch. 88 – 90. See also Wasson *v.* Gould, 3 Blackf. 18. [*Parkes *v* Gorton, 3 Rhode Is. R. 27.]

[2] *Ante*, Vol. 1, § 201; *Supra*, § 281.

declaration or conversation of a party is to be proved against him, the whole of what was said at the same time and in relation to the same subject, should be taken together. But this difference in the rules arises from the difference in principle between the two cases. For in Courts of Law, the evidence is introduced collaterally, as evidence, and not as a pleading; and therefore it is reasonable that the whole should be weighed together; and the rule in Chancery is the same, when an answer or other declaration of the party is introduced collaterally, and merely by way of evidence. So, when the bill is for *discovery* only, and the answer is read for that purpose, the rule still is to read the whole. But when, upon the hearing of a bill for *relief*, passages are read from the answer, which is put in issue by a replication, they are read not as *evidence* in the technical sense, but merely as a *pleading* to show what the defendant has *admitted*, and which therefore needs not to be proved; and hence the plaintiff is not required to read more than the admissions.[1]

§ 291. The distinction between a bill for discovery and a bill for relief, in the application of the rule above stated, is more strikingly apparent when a bill for *discovery*, after a discovery is obtained, is *by amendment converted into a bill for relief*. The defendant, in such case, being permitted to put in a new answer, the former is considered as belonging to a former suit, and therefore is permitted to be read as an answer to a bill of discovery, as evidence; and not as part of the defence or admission, upon which the bill proceeds.[2]

§ 291 *a*. In the case of a *supplemental bill*, which is merely a continuation of the original suit, all the testimony which was properly taken in the original suit, may be used in both suits, notwithstanding it was not entitled in the supplemental suit. If publication has passed in the original cause, no new evidence is admissible, in the supplemental cause, of matters previously in issue.[3] But, where a bill was brought by the son and heir of a

[1] 2 Johns. Ch. 90–94; 2 Poth. Obl. by Evans, 137, 138 (Amer. ed.); Ormond *v.* Hutchinson, 13 Ves. 51, *arg.* approved by Ld. Ch. Erskine, Id. 53; Thompson *v.* Lambe, 7 Ves. 587; Boardman *v.* Jackson, 2 Ball. & Beat. 382; Beckwith *v.* Butler, 1 Wash. 224; Bush *v.* Livingston, 2 Caines, Cas. 66; Green *v.* Hart, 1 Johns. 580, 590. If a judgment or decree in another cause is properly stated in the bill and admitted in the answer, the record of it is not requisite to be filed as an exhibit, but will be deemed sufficiently proved by the admission in the answer. Lyman *v.* Little, 15 Verm. 576.

[2] Butterworth *v.* Bailey, 15 Ves. 358, 363. And see Lousada *v.* Templer, 2 Russ. 561; 1 Story, Eq. Jur. § 64 *k*, 70–73.

[3] 3 Dan. Ch. Pr. 1683, 1684 [*3d Amer. Ed., 1611].

grantor, for the purpose of setting aside his conveyance to the defendant, on the ground of fraud, and a supplemental bill being filed, to bring in the administratrix of the grantor as a necessary party defendant, the cause was set down by the plaintiff for hearing, without replication to the answer to the supplemental bill; and the administratrix produced the letters of administration, in proof of her representative character; it was objected by the original defendant, that this evidence was inadmissible, and that, as his answer in the supplemental suit averred his original answer to be true, the cause could now be adjudicated only upon the facts stated in that answer. But it was held by the Vice-Chancellor, that the Court was entitled to look into the letters of administration, for the purpose of ascertaining the representative character of the administratrix, and that, notwithstanding the present posture of the suit, the evidence taken in the original cause was still before the Court.[1] The point, whether documentary evidence is admissible, when the answer is not replied to, was raised and argued, but was not decided. The cases on this point are conflicting; but the weight of authority seems to be in favor of admitting the proof of documents, the existence or genuineness of which is not denied.[2]

§ 292. We are next to consider *admissions made by express* AGREEMENT OF THE PARTIES, in order to dispense with other proof. These ordinarily ought to be in writing, and signed by each party or his solicitor; the signature of the latter being deemed sufficient, as the Court will presume that he was duly authorized for that purpose.[3] But it is not indispensably necessary that the agreement be written; in some cases, as, for example, the waiver of proof by subscribing witnesses, a parol agreement, either of the party, or of the attorney, has been held sufficient.[4] It must, however, be a distinct agreement to admit the instrument at the trial, dispensing with the ordinary proof of its execution; for what the attorney said in the course of conversation is not evidence in the

[1] Wilkinson *v.* Fowkes, 9 Hare, 193, 592; 15 Eng. Law & Eq. R. 163.

[2] 2 Dan. Ch. Pr. 975, 1025 [3d Amer. Ed. 833, 876, 877]. Rowland *v.* Sturgis, 2 Hare, 520; Chalk *v.* Raine, 7 Hare, 393; Jones *v.* Griffith, 14 Sim. 262; Neville *v.* Fitzgerald, 2 Dr. & War. 530. See *infra*, § 309.

[3] Gainsford *v.* Grammar, 2 Campb. 9; 2 Dan. Ch. Pr. 988 [*3d Amer. Ed. 845]; Gresley on Eq. Ev. 48; Young *v.* Wright, 1 Campb. 139. In some Courts, the rules require that these agreements should always be in writing, or be reduced to the form of an order by consent. See Suydam *v.* Dequindre, Walk. Ch. 23 (Michigan); Brooks *v.* Mead, Id. 389.

[4] Laing *v.* Raine, 2 B. & P. 85; Marshall *v.* Cliff, 4 Campb. 133.

cause.[1] The authority of the attorney to act as such will be sufficiently proved if his name appears of record.[2]

§ 293. Admissions of this sort, however, are *not to be extended by implication*, beyond what is expressed in the agreement. Thus, in an action of covenant, where the defendant's attorney signed an admission in these words, "I admit the due execution of the articles of agreement dated the 23d day of February, 1782, mentioned in the declaration in this cause," it was held that this only dispensed with the attendance of the subscribing witness, and did not preclude the defendant from showing a variance between the instrument produced in evidence and that described in the declaration; though, had the language been "*as* mentioned in the declaration," its effect might have been different.[3] So, where it was admitted that a certain exhibit was a notice, and that a certain other exhibit was a true copy of the lease referred to in the notice; it was held, that the admission of the notice was not evidence of the lease, and that the admission as to the copy of the lease only substituted the copy for the original, but did not place the copy in a better situation than the original would have been if it were produced but not proved.[4]

§ 294. Lastly, it is to be observed, that while the Courts will generally encourage the practice of admissions tending to the saving of time and expense, and to promote the ends of justice, they will *not sanction any agreement for an admission, by which any of the known principles of law are evaded.* Thus where a *husband* was willing that his *wife* should be examined as a witness, in an action against him for malicious prosecution, Lord Hardwicke refused to permit it, because it was against the policy of the law.[5] Admissions by *infants*,[6] and admissions evasive of the stamp-laws,[7] have been disallowed, on the same general principle.

### 3. DOCUMENTS.

§ 295. In respect to *documents*, the *first* point to be considered

[1] Laing *v.* Raine, 2 B. & P. 85; Marshall *v.* Cliff, 4 Campb. 133; Young *v.* Wright, *supra*; *Ante*, Vol. 1, § 186.

[2] Ibid.

[3] Goldie *v.* Shuttleworth, 1 Campb. 70.

[4] Mounsey *v.* Burnham, 1 Hare, 15. And see Fitzgerald *v.* Flaherty, 1 Moll. 350.

[5] 2 Dan. Ch. Pr. 988 [3d Amer. Ed. 846]; Barker *v.* Dixie, Rep temp. Hardw. 264. And see Owen *v.* Thomas, 3 My. & K. 357. Such seems to be the sound rule of law, though it has in one or two instances been broken in upon. See *ante*, Vol. 1, § 340.

[6] See *supra*, §§ 279, 280; Wilkinson *v.* Beal, 4 Mad. 408; Townsend *v.* Ives, 1 Wils. 216; Holden *v.* Hearn, 1 Beav. 445; Morrison *v.* Arnold, 19 Ves. 671.

[7] Owen *v.* Thomas, 3 My. & K. 353–357; 2 Dan. Ch. Pr. 989.

is their PRODUCTION; which, on motion, is ordered by the Court, either for their safe custody and preservation, *pendente lite*, or for discovery and use for the purposes of the suit.[1] [*But the plaintiff, in addition to a discovery of that which constitutes his own title, may seek a discovery for the purpose of repelling what he anticipates will be the case set up by the defendant. But this does not extend to a discovery of the *evidence* in support of the defendants,[2] and a party obtaining an order for the production of documents, is entitled to have them inspected by his solicitors and agents, as well as by himself. But neither he nor they are entitled to make public the information they obtain by means of such inspection; if necessary, an injunction will be granted to prevent it.[3]] Where the production is sought by the bill, and the discovery is not resisted, the documents are described either in the answer or in schedules annexed to it, to which reference is made. If the documents are not sufficiently described in the answer, or the possession of them by the defendant is not admitted with sufficient directness, the answer will be open to exceptions;[4] for the possession must be shown by the defendant's admission in the answer, and cannot be established by affidavit, unless, perhaps, where the plaintiff's right to the production is in question, and the documents are neither admitted nor denied in the answer; in which case the plaintiff has been admitted to verify them by affidavit.[5]

§ 296. If the documents are not in the defendant's actual custody, but are *in his power*,[6] as, if they are in the hands of his solicitor;[7] or of his agent, whether at home or in a foreign country;[8] or if they are about to come to his possession by arrival from abroad;[9] the Court will order him to produce them, if no cause appear to the contrary; and will allow a reasonable time for that purpose, according to the circumstances.[10] If they are in the joint

[1] See, on this subject, 3 Dan. Ch. Pr. ch. 41; Wigram on Discovery, pl. 284 *et seq.*; Story, Eq. Pl. §§ 858 – 860 *a*.

[2] [* Attorney-General *v.* Corporation of London, 2 Mac. & Gord. 247.

[3] Williams *v.* Prince of Wales, Life, &c. Co., 23 Beav. 338.]

[4] Ibid; Atkyns *v.* Wryght, 14 Ves. 211, 213; 3 Dan. Ch. Pr. 2045; [Robbins *v.* Davis, 1 Blatchf. C. C. 238.]

[5] Barnett *v.* Noble, 1 Jac. & W. 227; Addis *v.* Campbell, 1 Beav. 261; Lopez *v.* Deacon, 6 Beav. 254. And see Watson *v.* Renwick, 4 Johns. Ch. 381, where the history and reasons of the rule are stated. See also Story *v.* Lenox, 1 My. & C. 534; [Reynell *v.* Sprye, 8 Eng. Law & Eq. Rep. 35.]

[6] Taylor *v.* Rundell, 1 Cr. & Phil. 104; 3 Dan, Ch. Pr. 2041, 2042 [* 3d Amer. Ed. 1376].

[7] Ibid.

[8] Ibid.; Eagar *v.* Wiswall, 2 Paige, 369, 371; Freeman *v.* Fairlie, 3 Mer. 44; Murray *v.* Walter, 1 Cr. & Phil. 125; Morrice *v.* Swaby, 2 Beav. 500; [Robbins *v.* Davis, 1 Blatchf. C. C. 238.]

[9] Farquharson *v.* Balfour, Turn. & Russ. 190, 206.

[10] Ibid.; Eagar *v.* Wiswall, 2 Paige, 371;

possession of the defendant and others, not parties to the suit, but equally entitled, with him, to their custody, this will excuse the defendant from producing them, but he will still be required to inspect them and answer as to their contents;[1] and if they are in the hands of a common agent of the defendant and others, the plaintiff may have an order on such agent to permit him to inspect them; on the ground that the Court has a right to give the plaintiff all the access to the documents which the defendant would be entitled to claim.[2] Where the documents are in the hands of the defendant's agent or solicitor who wrongfully retains them, so that they cannot be controlled, he may be compelled, by being made a party to the cause.[3]

§ 297. To entitle the plaintiff to a production of documents, a merely general reference to them in the answer is not sufficient; they must be *described with reasonable certainty*, either in the answer or in the schedule annexed to it, so as to be considered, by the reference, as incorporated in the answer, and to enable the Court to make an order for their production, and afterwards to determine whether its order has been precisely and duly obeyed.[4]

§ 298. It is further necessary that the plaintiff, in order to be entitled to the production of documents, should either have a *right to the documents* themselves, or *a sufficient interest in inspecting them*. And this right must appear in his bill, and cannot, regularly, be established by collateral proof. Thus, where, after an answer, admitting the possession of certain documents relating to the matters of some of them in the bill, the plaintiff amended the

Taylor *v.* Rundell, 1 Phil. C. C. 225; 11 Sim. 391.

[1] 3 Dan. Ch. Pr. 2042, 2043 [*3d Amer. Ed. 1377]; Taylor *v.* Rundell, 1 Cr. & Phil. 1110; Murray *v.* Walter, Id. 114; [*Edmonds *v.* Foley (Lord), 30 Beav. 282, S. C. 8 Jur. N. S. 552.]

[2] Walburn *v.* Ingilby, 1 My. & K. 61.

[3] Ibid.; Fenwick *v.* Read, 1 Mer. 125.

[4] Atkyns *v.* Wryght, 14 Ves. 211; Watson *v.* Renwick, 4 Johns. Ch. 381. [*Where a case is made out, raising a reasonable suspicion that a defendant who has made an affidavit as to documents, has in his possession other documents relating to the matters in question and not disclosed by the first affidavit, the Court may order him to make a further affidavit, although the first is sufficient in point of form. Noel *v.* Noel, 1 DeG. J. & Sm. 468. And where a defendant against whom a decree for an account was made, had before decree made full discovery by answer as to documents in his possession, it was held, nevertheless, that the plaintiff after decree was entitled to call for an affidavit as to his possession of any other documents than those mentioned in his answer relating to the matters in question. Hanslip *v.* Kitton, 1 DeG. J. & Sm. 440.] [The power of the Court to compel either of the parties to a suit to produce books and papers in their possession relating to matters in issue between them, is to be exercised with caution, and the party calling for its exercise must, with a reasonable degree of certainty, designate the books and papers required, and the facts expected to be proved by them. Williams *v.* Williams, 1 Md. Ch. Decis. 199; Robbins *v.* Davis, 1 Blatchf. C. C. 238; Jackling *v.* Edmonds, 3 E. D. Smith, 539.]

bill by striking out a part of the matters to which the documents related, and then moved for a production of them upon the answer; it was refused, because his right to it was no longer apparent upon the bill.[1] If the defendant admits that they are *relevant* to the plaintiff's case, this will throw on the defendant the burden of excusing himself from producing them.[2] But the plaintiff's right to the production must relate to the purposes of the suit; and to the relief prayed for; if the object be collateral to the suit; as, if a copy of a certain book be demanded, for the purposes of his trade, this is not such an interest as will entitle him to the production.[3] So, if the production of a document be sought only for the ulterior purposes of enabling the plaintiff to carry into execution the decree which he may obtain in the cause, and not for the purposes of proving his right to a decree, an inspection will not be granted before the hearing.[4] The sufficiency of the

[1] Haverfield *v.* Pyman, 2 Phil. C. C. 202. [* For the purpose of an application for the production of documents, it must be assumed that the plaintiff's case, as alleged in the bill, is true in order to test whether he is entitled to production of documents upon that assumption; because if the Court must wait until the fate of the litigation is known, that would be equivalent to refusing production. Gresley *v.* Mousley, 2 Kay & J. 288.]

[2] Smith *v.* D. of Beaufort, 1 Hare, 519; Tyler *v.* Drayton, 2 Sim. & Stu. 310; 3 Dan. Ch. Pr. 2046–2048 [* 3d Amer. Ed. 1379]. [* The Court accepts the oath of a defendant whether documents are relevant; but the plaintiff has a right to judge for himself whether they will assist his case, and is entitled to the production of all relevant documents, except such as the Court can clearly see to have no bearing on the issue. Mansell *v.* Feeney, 2 Johns. & H. 320.]

[3] 3 Dan. Ch. Pr. 2049 [* 3d Amer. Ed. 1380]; Lingen *v.* Simpson, 6 Madd. 290.

[4] Ibid.; Wigram on Discovery, Pl. 295. The observations of this learned Vice-Chancellor on this point deserve particular attention, and are as follows: "Supposing the answer to contain the requisite admission of possession by the defendant, and a sufficient description of the documents, the plaintiff must next show *from the answer* that he has a right to see them. This is commonly expressed by saying that the plaintiff must show that he has *an interest* in the documents, the production of which he seeks. There can be no objection to this mode of expressing the rule, provided the sense in which the word *interest* is used be accurately defined. But the want of such definition has introduced some confusion in the cases under consideration. The word *interest* must here be understood with reference to the subject-matter to which it is applied. Now, the *purpose* for which discovery is given is (simply and exclusively) to aid the plaintiff on the trial of an issue between himself and the defendant. A discovery beyond or uncalled for by this particular purpose, is not within the reason of the rule which entitles a plaintiff to discovery. The word *interest*, therefore, must in these cases be understood to mean an interest in the production of a document for the purpose of the trial about to take place. According to this definition of the word *interest*, — if the object of the suit or action be the recovery of an *estate*, — the plaintiff in a bill in aid of proceedings to recover that estate, will, *primâ facie*, be entitled, *before* the hearing of the cause, to the production of every document, *the contents* of which will be evidence at that hearing of his right to the estate. But the same reason will not *necessarily* extend to entitle the plaintiff, *before* the hearing of the cause, to a production of the title deeds appertaining to the estate in question. He may, indeed, and (if his bill be properly framed) he will be entitled to have these title deeds *described* in the answer, and also to a discovery whether they are in the defendant's possession; because, without proof of such matters (and whatever the plaintiff must prove the defendant must *primâ facie* answer), a perfect decree could not be made in the plaintiff's favor. The

plaintiff's interest in the documents, of which a discovery and production are required, depends on their *materiality* to his case; for the right of the plaintiff is limited, in the well-considered language of Vice-Chancellor Wigram, to "a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."[1] But an exception to this limitation is admitted, where the defendant, in stating *his own title*, states a document shortly or partially, and for the sake of greater caution refers to the document, in order to show that its effect has been accurately stated; in which case, though the document be not in itself material to the plaintiff's title, the Court will order its production *as part of the answer*.[2] [* In a somewhat recent case,[3] before Vice-Chancellor

same observations will apply to a case, in which the object of the suit is to recover the possession of documents. The plaintiff is entitled to know *what* the documents are, and *who holds them*. But there is no reason why the plaintiff should, in cases of the description here noticed, inspect the documents *before* the hearing of the cause. Unless the meaning of the word '*interest*' be limited in the way pointed out, it is obvious that the effect of a simple claim (perhaps without a shadow of interest) would be to open every muniment room in the kingdom, and every merchant's accounts, and every man's private papers to the inspection of the merely curious."

[1] [* Ingilby *v.* Shafto, 33 Beav. 31.] Wigram on Discovery, pl. 26, p. 15. As to the nature of the *materiality*, see Id. pl. 224 *et seq.*; [Robbins *v.* Davis, 1 Blatchf. C. C. 238.]

[2] Hardman *v.* Ellames, 2 My. & K. 732; Adams *v.* Fisher, 3 My. & C. 548; Eager *v.* Wiswall, 2 Paige, 371. The soundness of the exception stated in the text has been strongly questioned by Vice-Chancellor Wigram (on Discovery, pl. 385–424, 2d ed.), to which the student is referred; the further consideration of the point being foreign to the plan of this work. See also Story, Eq. Pl. § 859; 3 Dan. Ch. Pr. 2056–2060 [* 3d Amer. Ed. 1385]; Latimer *v.* Neate, 11 Bligh, 149; Phillips *v.* Evans, 2 Y. & C. 647. It may, however, be here added, that the English rule, that the plaintiff, in a bill of discovery, shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant, is deemed inconsistent with the course of remedial justice as administered in *Massachusetts*, which permits a full inquiry as to all and any facts that may impeach the right of property in the party of whom the inquiry is made. Adams *v.* Porter, 1 Cush. 170. The like principle, it is conceived, will apply in the jurisprudence of *Maine*, and such other States as pursue similar forms of remedy.

[In Swinborne *v.* Nelson, 15 Eng. L. & Eq. 578 (16 Beav. 416; 22 Law J. Rep. N. S. ch. 331), the Master of the Rolls, Sir John Romilly, said: "I am disposed to believe that the decision of Adams *v.* Fisher was intended by the Lord Chancellor to be limited to withholding only the production of the documents which could not assist the plaintiff in making out his title to the relief sought; at least the observations made by his lordship, respecting the admission of counsel to the question put by the Court, seemed to point to this result. However this may be, the authorities which relate to the subject were not commented on, nor brought to the attention of the Court; and after the most careful consideration which I am able to give to this subject, I am of opinion, that if the case of Adams *v.* Fisher goes beyond the point I have last suggested, it is not in accordance with the long line of authorities before decided in this Court; and therefore, if I have to choose between that case and other cases decided by equally high authority, I feel myself compelled to follow those which are alone, in my opinion, consistent with the principle on which pleadings in equity can be clearly and safely established." And the Court stated, in another

[3] [* Howard *v.* Robinson, 5 Jur. N. S. 136.]

Kindersley, this question is carefully examined, and the principles discussed. The learned judge denied that the mere reference to a paper, by the defendant in his answer, gave the plaintiff any right to examine it. The plaintiff, it was admitted, always had the right to the inspection of any paper in the defendant's possession which would assist his case, but had no right to see any such document tending merely to establish defendant's case. And it would seem, upon principle, that the usual reference in an answer to a written instrument, for greater certainty, did not oblige the party to produce it merely for the inspection and advantage of his opponent, until the trial, and not then, unless he chose. The case of Hardman *v.* Ellames[1] is here examined, and, as far as this question is concerned, limited or explained.]

§ 299. If the documents and papers, of which production is required, are admitted to be in the defendant's possession, he will be required to produce them, though they are *not referred to* in the answer, and though they relate to the defendant's title, provided they also relate to the plaintiff's title; but not otherwise.[2] If they *are referred to*, but are not admitted to be in his possession, the Court cannot order their production, unless it appears that they are in the hands of some person over whom the defendant has control.[3] And if the defendant admits that he has the document in question, and offers to produce it *if the Court should require him so to do*, this is merely a submission to the discretion of the Court.[4] If they have already been produced before a commissioner, in order that the plaintiff may prove them as exhibits, the defendant is bound to have them in Court at the hearing, though there has been no direct order for their production.[5]

part of the opinion, "It is impossible to lay down one rule on this subject of production of documents, and another upon answers to be put to interrogatories."]

[1] [*2 My. & K. 732.] .

[2] Hardman *v.* Ellames, 2 My. & K. 732; Bligh *v.* Berson, 7 Price, 205; Firkins *v.* Lowe, 13 Price, 103; Farrar *v.* Hutchinson, 3 Y. & C. 692; Burton *v.* Neville, 2 Cox. 242.

[3] Hardman *v.* Ellames, *supra;* Darwin *v.* Clarke, 8 Ves. 158. And see Story, Eq. Pl. § 859; *Supra*, § 296. [* Where a solicitor was charged with fraud, and a deceased client, of whom there was no legal representative, was alleged to be a party to the fraud, it was held that the solicitor must produce documents bearing on the transaction, whether his own or those of his deceased client. Feaver *v.* Williams, 11 Jur. N. S. 902. The mortgagee of a testator advanced sums of money to his executrix, and the trustee of the mortgaged property, for the benefit of the *cestui que trustent* under the will. In consideration of these advances he purchased the equity of redemption from the trustee. On a summons to compel him to produce the purchase deed and the preliminary agreement in a redemption suit by two of the *cestui que trustent*, it was held that they must be produced, as they might disclose the dealings of the trustee with the trust property. Smith *v.* Barnes, 11 Jur. N. S. 924.]

[4] Anon. 14 Ves. 213, 214, per Ld. Eldon.

[5] Wheat *v.* Graham, 7 Sim. 61.

§ 300. The discovery and production of documents and papers by the defendant, may be *successfully resisted*, by showing that they are *privileged*, either by professional confidence, or by their exclusively private character;[1] or, that the discovery and production would tend to involve him in a *criminal charge;* or subject him to a *penalty* or *punishment*, or to *ecclesiastical censures*, or to a *forfeiture of his estate.* All these classes of exemptions having been fully treated in a preceding volume, any further discussion of them in this place is superfluous.[2] But it should be observed, that, regularly, the grounds of exemption on which the discovery is resisted ought to appear in the answer; though sometimes an *affidavit* may be filed, for the purpose of more fully showing that the documents in question support exclusively the title of the de-

[1] [*In Lafone *v.* Falkland Island Company, 4 Kay & J. 34, it was held that answers to inquiries addressed by defendants in England to their agent in the Falkland Islands, by direction of their solicitor, for the purpose of procuring evidence in support of defendants' case, are within the rule as to protection. "The true test in such cases is, not whether the person, who is at a distance and transmits the information, is the agent of the solicitor, and sent out by him, but whether, in transmitting that information, he was discharging a duty which properly devolved on the solicitor, and which would have been performed by the solicitor had the circumstances of the case admitted of his performing it in person."]

[2] See *ante*, Vol. 1, §§ 237 – 254, 451 – 453. [A defendant is not bound to produce, by way of answer, any public documentary evidence of which he is the official keeper. Salmon *v.* Clagett, 3 Blandf. Ch. Rep. 145. But see Beresford *v.* Driver, 11 Beav. 387.] [* The protection afforded to political documents does not depend upon the question whether the person called on to produce them is a party to the suit, but on the ground of the mischief to the public which would arise from the disclosure of such documents. Wadeer *v.* East India Company, 2 Jur. N. S. 407. A rector of a parish filed a bill to recover lands and tithes as belonging to the rectory. The defendants answered as to the tithes, but refused by their answer to give any discovery as to the land. *Held*, that they having submitted to answer, could not refuse discovery as to the land on the ground that the bill, so far as it sought relief as to the land was demurrable, as stating only a legal title in the plaintiff, without showing any grounds for equitable relief. Bates *v.* Christ's College, Cambridge, 8 De G. Mac. & G. 726. The reports of an accountant employed by a defendant's solicitor to investigate books are privileged from production. Walsham *v.* Stainton, 2 H. & M. 1. A trustee taking counsel's opinion to guide himself in the administration of his trust, and not for the purpose of his defence in a litigation against himself, is bound to produce them to his *cestui que* trust, but the relation of trustee and *cestui que* trust must for that purpose be first established. A mere claimant to an estate is not entitled to the production of cases and opinions taken by a trustee, and documents accompanying a case for the opinion of counsel are privileged. Wynne *v.* Humberston, 27 Beav. 421. So a married woman, living apart from her husband, must, as between herself and her husband, or those claiming under him, disclose all correspondence with her solicitor which relates to business in which she and her husband were mutually interested, and in which there was nothing adverse to him. But where her interest is adverse to her husband, and where, rightly or wrongly, she acts as a *feme sole*, her communications and correspondence will be privileged. Ford *v.* De Pontès, 5 Jur. N. S. 993. A communication, to come within the principle of privilege, must be made by a solicitor to his client, or *vice versâ*, and also in relation to the actual thing to which the interrogatory relates. It is not sufficient that the knowledge is stated to have been acquired during the subsistence of the relation of solicitor and client. Marsh *v.* Keith, 6 Jur. N. S. 1182. See also Thomas *v.* Rawlings, 27 Beav. 140, and Black *v.* Galsworthy, 3 L. T. N. S. 399.]

fendant, and relate solely to his defence, or are otherwise privileged; or that they are not in his custody or power.[1]

§ 301. The *order for production* of documents, in American practice, usually directs that they be deposited with the Clerk of the Court. But in special cases, the Court will order that they be produced at the defendant's place of business, or at the office of his solicitor, or at the master's office, or elsewhere, according to the circumstances. And where books are to be produced, the defendant will have leave to seal up and conceal all such parts of them as, according to his affidavit previously made and filed, do not relate to the matters in question.[2]

[* § 301 *a*. Where the defendant was sued in Equity, as surviving partner in a firm of commission wine-merchants, and was required to set out in his answer a full account of the partnership transactions, for the six months preceding the decease of the former partner, it was held not sufficient to set out the accounts, by way of reference to a book in which they were contained, on the ground that the persons named were privileged customers; and upon exceptions to the answer, upon that ground, it was declared,

[1] Llewellyn *v.* Badeley, 1 Hare, 527. And see Morrice *v.* Swaby, 2 Beav. 500; 3 Dan. Ch. Pr. 2066. [A defendant, after answering that he had not personally inspected the documents in his possession relating to the subject of the suit, stated that he was advised, and that, to the best of his knowledge, information, and belief, it was the fact, that the documents did not, nor did any of them in any way, make out, or evidence, or support, or tend to make out, or evidence, or support, the case or any part of the case, made by the plaintiff, nor defeat or impeach the case of defence, nor any part of the case or defence, of the defendant, but were evidence in support of the defendant's case. *Held*, that, as it appeared that the defendant had not inspected the documents, they were not protected from the order for their production. Manby *v.* Bewicke, 39 Eng. Law & Eq. 412; Att'y-Gen. *v.* London, 2 Mac. & Gord. 247.] [* In a bill for an account the plaintiff charged fraud and wilful neglect against the defendants, who interrogated him as to invoices and other documents in his (the plaintiff's) possession. The plaintiff's answer alleged that they were at New Orleans, and that he was unable to communicate with his clerks there or to proceed thither to fetch them. The defendant excepted to this answer. *Held*, that such documents, which tended to establish or disprove the fraud charged, must be produced before the hearing, and were not fitting subjects of an inquiry in chambers; and that the plaintiff was bound to show that he has attempted to obtain the documents and failed in that attempt, a mere allegation that they are in a country where war is raging not being sufficient. Mertens *v.* Haigh, 8 L. T. N. S. 561.]

[2] See 1 Hoffm. Ch. Pr. 306 – 319, where the law on the subject of the production of documents, with the cases, will be found fully stated. The violation of the seals, by the adverse party, is punishable as a contempt. Dias *v.* Merle, 2 Paige, 494. And see 2 Dan. Ch. Pr. 2064 – 2066 [* 3d Amer. Ed. 1388]; Napier *v.* Staples. 2 Moll. 270; Titus *v.* Cortelyou, 1 Barb. 444. [Where the answer sets forth extracts from the defendant's books, which are sworn to embrace everything in the books that relates to the subject-matter of the suit, the plaintiff cannot, upon motion, and on suggestion that the extracts given are, if not garbled, at least liable to suspicion, entitle himself to a general inspection of the books of the defendant relating to other matters. He is entitled to the production, for inspection, of the books which contain the extracts given, but the defendant is at liberty to seal up the other parts of the books, and the inspection must take place under the supervision of an officer of the Court. Robbins *v.* Davis, 1 Blatchf. C. C. 238.]

that the defendant ought to have set out the account in a schedule in his answer, and that the objection that the names of the customers were privileged did not apply to such a case.[1]]

§ 302. We have spoken of the production of documents by the defendant, because, by the regular course of practice in Chancery, it is only by means of a bill, and therefore only by a plaintiff, that a discovery can be obtained; and, therefore, if the defendant would obtain the production of documents from the plaintiff, he must himself become a plaintiff, by *filing a cross-bill;* in which case all the preceding rules will apply in his favor, against the plaintiff in the original bill.[2] But, ordinarily, no answer to the cross-bill can be obtained, until the defendant has filed a full answer to the original bill, and complied with the order for the production of documents on his part.[3]

§ 303. This general rule, that when a defendant would obtain the discovery and production of documents from the plaintiff, he can obtain it *only by a cross-bill*, is dispensed with in a few cases in the English practice, constituting *exceptions to the rule.* Formerly, when a document in the plaintiff's possession, mentioned in the bill, was necessary to the defendant, for the making of a full answer, the Court has sometimes ordered the plaintiff to give him a copy of it; and at other times the Court has stayed proceedings against the defendant, for not putting in his answer, until the plaintiff would give him an inspection of the documents in question; especially if both parties were equally entitled to the possession; as, for example, in the case of partnership books.[4] And in a more recent and celebrated case, where the plaintiff, in a bill against executors, stated that two promissory notes, of the same

[1] [* Pelford *v.* Ruskin, 1 Drew & Sm. 148. But we apprehend that in such a case, unless the *names* of the customers were very essential, the court would not require them to be set out upon the schedule. And where interrogatories are in a form which would make it oppressive to require a detailed answer, a defendant may answer by reference to books, but he must refer to them with such explanation and in such a manner as to make it as convenient as possible for the plaintiff to consult them. Drake *v.* Symes, 1 Johns. 647; 6 Jur. N. S. 318.]

[2] See Penfold *v.* Nunn, 5 Sim. 409, that a defendant cannot obtain such production from the plaintiff, merely by motion, though he makes oath that an inspection is necessary to enable him to answer the bill. [Bogert *v.* Bogert, 2 Edw. Ch. 399; White *v.* Buloid, 2 Paige, Ch. 164; Field *v.* Schieffelin, 7 Johns. Ch. 252; Talmage *v.* Pell, 9 Paige, Ch. 410.]

[3] 3 Dan. Ch. Pr. 2069 [* 3d Amer. Ed. 1390]; Pr. of Wales *v.* E. of Liverpool, 1 Swanst. 123, 124. This rule is expressly adopted as a rule of practice, in cases in Equity, in the national courts of the United States, and in the courts of some of the several States. See Rules U. S. Courts in Equity Cases, Reg. 72; *Massachusetts*, Rules in Chancery, Reg. 13; *Illinois*, Rev. Stat. 1845, ch 21, § 29; *Florida*, Thompson's Dig. p. 459, § 11.

[4] 3 Dan. Ch. Pr. 2070, 2071 [* 3d Amer. Ed. 1391]; 1 Swanst. 124, 125; Potter *v.* Potter, 3 Atk. 719; Pickering *v.* Rigby, 18 Ves. 484.

date, had been given by the testator, the one in English and the other in French currency, but of the same amount and for securing the payment of the one single sum of £15,000, mentioned in both notes; one of the executors made affidavit that he had inspected the former of the two notes and had observed appearances on it tending to impeach its authenticity; and that he was informed and believed that the latter note had been produced for payment in Germany, and that an inspection of it was necessary, before he could make a full answer to the case stated in the bill; and moved that he might have time to make answer after such inspection should be given; it was held by Lord Eldon that this was sufficient ground to entitle the defendants to a production of the instrument before answer; and accordingly it was ordered, that the plaintiff be at liberty to come at any time in reply to the affidavit, and that in the mean time the defendants should not be called on to answer, until a fortnight after the instrument had been produced.[1] But in this country, in ordinary cases not regulated by statute, the plaintiff cannot be compelled, on motion, to give the defendant an inspection of his books and documents, in order to enable the defendant to answer the bill and make his defence; but if the plaintiff, on request, refuses to permit such inspection of books and documents, he will not be allowed to except to the answer for insufficiency in not stating their contents.[2] In cases of partnership, however, where the controversy is between the partners or their representatives, the party having possession of the partnership books and papers will be ordered, on motion, and in any stage of the suit, to place them in the hands of an officer of the Court, for the inspection of the other party, and that he may take copies if necessary.[3] And if documents are impeached by either party as false and fraudulent, they will be ordered to be brought into Court for inspection.[4]

§ 304. But in the Federal Courts of the United States, the necessity for resorting to the Equity side, by a bill for the discovery

[1] The Princess of Wales *v.* E. Liverpool, 1 Swanst. 114, 115. 125 – 127. The same rule was administered in Jones *v.* Lewis, 2 Sim. & Stu. 242; and though the order was discharged by Lord Eldon, on appeal, 4 Sim. 324, yet the ground of the discharge does not appear, and it is hardly probable that he intended to reverse his previous decision in the case above mentioned. The same rule was also adopted in its principle by Lord Langdale, M. R., in Stephen *v.* Morris, 1 Beav. 175. But its soundness, as a general rule, was questioned by the Vice-Chancellor of England, in Penfold *v.* Nunn, 5 Sim. 410, and again in Milligan *v.* Mitchell, 6 Sim. 186.

[2] Kelly *v.* Eckford, 5 Paige, 548.

[3] Ibid. [See also Christian *v.* Taylor, 11 Sim. 400.]

[4] Comstock *v.* Apthorpe, 1 Hopk. Ch. R. 143; 8 Cowen, 386, S. C.

of documents in aid of the jurisdiction at Law, is entirely obviated by the statute,[1] which empowers all the Courts of the United States, in the trial of actions at Law, on motion, and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in Chancery.* And if a plaintiff shall fail to comply with such order to produce books or writings, it is made lawful for the respective Courts, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if the defendant shall fail to comply with such order, judgment may be entered against him by default. Under this statute it is requisite, whenever a judgment by nonsuit or default is intended to be claimed, that notice be given to the adverse party to produce the papers in question, describing them with sufficient particularity, and stating that on his failure to produce them it is intended to move for judgment against him. This judgment is obtained, after a rule *nisi* for the production of the papers, granted on motion, supported by the affidavit of the party applying.[2] If the adverse party makes oath that he has not the papers, this may be met by the oath of two witnesses, or of one with other corroborating and preponderating evidence.[3]

[1] Stat. U. S. 1789, ch. 20, § 15; [1 Stat. at Large, 82;] Geyger *v.* Geyger, 2 Dall. 332.

[2] Hylton *v.* Brown, 1 Wash. C. C. R. 298, 300; Bas *v.* Steele, 3 Wash. 381, 386; Dunham *v.* Riley, 4 Wash. 126; United States *v.* Pins, Gilp. 306. [See also Vasse *v.* Mifflin, 4 Wash. C. C. 519.]

[3] Hylton *v.* Brown, *supra;* Bass *v.* Steele, *supra.* This statute is held not to apply to proceedings *in rem;* because a judgment as by default cannot be rendered against a *defendant,* in proceedings of that kind; and because Chancery will not compel a party to produce evidence which would subject him to a forfeiture. United States *v.* Pins, Gilp. 306.

In most of the several States, also, the necessity for a bill of discovery of documents is either entirely done away, or in a great degree obviated, by statutory provisions and Rules of Practice. In all the States, it is believed, office-copies of deeds and other documents required by law to be registered, may be read in evidence by any party, other than the grantee or obligee, and in many of the States, deeds and other documents, acknowledged or proved before the proper magistrate or Court in the mode provided by law, are admissible as *primâ facie* evidence. See *ante,* Vol. 1, §§ 91, 571, n. 573, and note. In some of these States, and in others, also, summary modes are established for the discovery and production of books, papers and documents, whenever they are material to the support or defence of any civil action or suit. Thus, by the Revised Statutes of *New York,* the Supreme Court is empowered, in such cases as shall be deemed proper, to compel any party to a suit pending therein to produce and discover books, papers, and documents in his possession or power, relating to the merits of any such suit, or of any defence therein. 2 Rev. Stat. p. 262, tit. 3, part 3, ch. 1, § 30. To entitle a party to any such discovery, he is required to present a petition, verified by oath, to the Court, or any Justice thereof, or to any Circuit Judge in vacation, upon which an order may be granted for the discovery sought, or that the party against whom the discovery is sought should show cause why it should not be granted. Id. § 32. Every

§ 305. If documents, the production of which is desired, are *in the possession of one who is not a party to the suit*, he may be compelled by a *subpœna duces tecum*, to produce them; and if the *subpœna* is not obeyed, he will be punished for contempt, on proof by affidavit that the documents are in his custody.[1]

such order may be vacated by the Court or magistrate by whom it was granted, upon satisfactory evidence that it ought not to have been granted; or, upon the discovery sought having been made; or, upon the party, required to make the discovery, denying on oath the possession or control of the books, papers, or documents ordered to be produced. Id. § 33. The books, papers, and documents, thus produced are allowed the same effect, when used by the party requiring them, as if produced upon notice. Id. § 36.

By the Code of Practice, as amended in 1849, the Court before which an action is pending, or any Judge or Justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action, or the defence therein. If compliance with the order be refused, the Court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both. *New York* Code of Practice, § 388 [342].

These two provisions, of the Revised Statutes and of the Code of Practice, have been deemed to stand well together, the former not being repealed by force of the latter. Follett *v.* Weed, 1 Code Rep. 65; Dole *v.* Fellows, 1 Code Rep. 146, N. S. And see Brown *v.* Babcock, 1 Code Rep. 66: Stanton *v.* Del. Mut. Ins. Co., 2 Sandf. S. C. R. 662; Moore *v.* Pentz, Id. 664. And the power thus vested in the Court has been held to extend to all cases where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial; as well as to cases where evidence is sought in support of his own title. Powers *v.* Elemendorf, 2 Code Rep. 44.

By another provision of the same Code, no *action* to obtain discovery under oath, in aid of the prosecution or defence of another action can be allowed, nor can any examination of a party be had, on behalf of the adverse party, except in the manner afterwards prescribed in the same Code, namely, as a witness, and in the manner of any other witness. N. York Code of Practice, § 389. This section is held merely to abolish the Chancery bill for discovery; and not to effect the mode, by petition, prescribed in the Statutes or Code. Follett *v.* Weed, *supra*.

Regulations, substantially to the same effect, in regard to the production of documents, &c., may be found in the Statutes of *Iowa*, Code of 1851, §§ 2423 – 2425; *Arkansas*, Rev. Stat. 1837, ch. 23, §§ 50 – 53; *Missouri*, Rev. Stat. 1845, ch. 136, art. 4, §§ 7 – 19; Id. ch. 137, art. 2, §§ 31 – 34; *Illinois*, Rev. Stat. 1845, ch. 83, § 12; *Louisiana*, Code of Practice, art. 140 – 142, §§ 473 – 475, 917 – 919, 1037; and *Indiana*, Rev. Stat. 1852, part 2, ch. 1, §§ 304 – 306. See also *California*, Rev. Stat. 1850, ch. 142, §§ 294, 295; *Georgia*, 1 Cobb's Dig. pp. 463, 465; Rev. Stat. 1845, p. 529, ch. 19, art. 7, § 146; *Florida*, Thompson's Dig. p. 459, § 11.

In *Virginia*, it is at the option of a party either to file a bill in Chancery for the discovery and production of books and writings, or to apply to a commissioner of the Court, by petition and affidavit, alleging his belief of the possession of such books and writings by the other party, and their materiality as evidence for him and describing them with reasonable certainty; in which case the Court, after notice to the adverse party, being satisfied of the truth of the allegations, and that the petitioner has no other means of proving the contents of the books and papers, will compel their production; unless the adverse party shall answer upon oath that they are not under his control. Code of 1849, ch. 176, §§ 39, 40.

In *Maine*, the party requiring the production of books, papers, or documents in the possession of the opposite party, may file a rule with the clerk, and give notice of it to the other party, stating the fact, the ground of his claim of discovery and production, its necessity, and the time and place; and if the parties do not dispose of the subject by mutual arrangement, copies of the rule and proceedings may be transmitted to one of the Judges, whose decisions and directions will be binding on the parties. Maine Sup. Jud. Court Rules in Chancery, Reg. 17. In *Maryland*, the Chancellor is empowered, by statute, on application of either party on oath, to order and decree the production of any books, writings, or papers in the possession of the other party, containing evidence relative to the matters in dispute between them. Stat. 1798, ch. 84, § 2 (Dorsey's ed.).

[1] See *ante*, Vol. 1, §§ 558, 559.

§ 306. In regard to *documents produced on notice*, it has already been stated as the *rule at Law*, that ordinarily, the party calling for their production and offering them in evidence, must prove their execution, notwithstanding they came out of the custody of the adverse party, and are produced at the trial; and that an exception to this rule is allowed, where the party producing the instrument is himself a party to it, claiming under it an abiding interest in the subject of the action;[1] or where the instrument was taken by the party producing it, in the course of his official duty as a public officer, as, for example, a bail-bond, taken by the sheriff, and produced by him on notice.[2] *In Equity* this rule holds good to its full extent, as to documents in the hands of a *plaintiff;* but it is said that, as to documents in the hands of a *defendant*, the rule applies only to those of which the plaintiff is entitled to call for an inspection, but which the defendant has insisted on some privilege to withhold.[3]

§ 307. The *effect of an order for the production of documents* is only to give the party obtaining the order the right to inspect and take copies of them. It does not make them evidence in the cause, except in those cases in which the mere circumstance of their coming out of the custody of the other party would, in itself, render them admissible. If, therefore, the party obtaining the order wishes to have them proved in the cause, or produced at the hearing, the order should be specially framed for that purpose. The order itself establishes the fact, that the documents came out of the adverse party's custody, into the hands of the officer of the Court; and therefore, when they are produced in answer to a bill of discovery, it is not necessary, for the purpose of proving this fact, to read any part of the answer.[4]

§ 308. Having thus considered the subject of the *production*, we proceed, in the *second* place, to the PROOF OF DOCUMENTS. And

[1] *Ante*, Vol. 1, §§ 560, 571; Betts *v.* Badger, 12 Johns. 223; Jackson *v.* Kingsley, 17 Johns. 158.

[2] Scott *v.* Waithman, 3 Stark. 168.

[3] Gresley on Evid. p. 173. If a document is stated in the bill, and admitted and referred to in the answer, it cannot be read from the bill, but ought still to be produced. Cox *v.* Allingham, Jac. 339.

[4] 3 Dan. Ch. Pr. 2068 [*3d Amer. Ed. 1389]; Taylor *v.* Salmon, 3 My. & Cr. 422. And see *ante*, Vol. 1, §§ 560 - 563. [*An order having been made for production of books of account relating to the traffic of a railway company, with liberty for the plaintiff, "his solicitors and agents," to inspect, peruse, and take copies, the plaintiff's solicitor went to inspect them, accompanied by a professional accountant, who was the auditor of a neighboring railway company. *Held*, that the connection of the accountant with the other company made him an improper person to inspect the books, and that the plaintiff ought not to have introduced him. Draper *v.* Manchester, Sheffield & Lincolnshire Railway Company, 3 DeG. F. & J. 23.]

here it may be generally observed, that written instruments, the execution of which is not admitted, and which do not prove themselves, must be proved by the same evidence in Equity as at Law.[1] The evidence for this purpose is taken in the mode in which other evidence is taken in Chancery proceedings, which is ordinarily by depositions before an examiner, commissioner, or other officer, and which will hereafter be stated.[2]

§ 309. In certain cases, however, constituting *exceptions* to this general rule, witnesses may be examined *vivâ voce* at the hearing; namely, first, where the plaintiff, finding sufficient matter confessed in the answer to entitle him to a decree, sets down the cause for a hearing upon the bill, answer, and exhibits; and, sec-

[1] *Ante*, Vol. 1, §§ 564 – 584; 2 Dan. Ch. Pr. 1024. For the law respecting the proof of Deeds, see *ante*, Vol. 2, tit. DEED, §§ 293 – 299.

It is proper in this place to mention the provision made in the statutes of some of the States, for the solemn admission of the genuineness of documents intended to be used in the trial of causes, whether at Law or in Equity. The provision on this subject, in the *New York* Code of Practice, § 388 [341], is in the following words: "Either party may exhibit, to the other or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission; unless it appear, to the satisfaction of the Court, that there were good reasons for the refusal." The same regulation is enacted in *California*. Rev. Stat. 1850, ch. 142, § 294.

In other States, provision to the like effect is made by the Rules of Court. And in several States, where the suit or defence is professedly founded in whole or part on the deed or other instrument in writing of the adverse party, it is admissible in evidence without proof, unless such party shall expressly deny its genuineness under oath. See *Texas*, Hartl. Dig. art. 633, 634, 741, 742; *Wisconsin*, Rev. Stat. 1849, ch 98, § 85; *Arkansas*, Rev. Stat. 1837, ch. 116, § 10; *Missouri*, Rev. Stat. 1845, ch. 136, § 23; *Ohio*, Rev. Stat. 1841, ch. 46, § 18; *Virginia*, Code of 1849, ch. 171, § 38; *Illinois*, Rev. Stat. 1845, ch. 83, § 14; *Indiana*, Rev. Stat. 1852, part 2, ch. 1, § 304.

The mode of proving public and private documents has been fully treated, *ante*, Vol. 1, §§ 479 – 491, 501 – 521, 569 – 582.

[2] When a document or paper is proved by the deposition of a witness, it is usual for the magistrate or officer, who takes the deposition, to mark it with a capital letter, and to certify thereon that "this paper, marked with the (A) was *exhibited* to the deponent at the time of his being sworn by me, and is the same by him referred to in his deposition hereto annexed"; or "taken before me on" such a day, &c.; and hence such documents and papers are termed *Exhibits*. The same term is also applied to instruments which, on being *exhibited* to the adverse party, are thereupon solemnly admitted by him to be genuine, and may therefore be read in evidence without other proof; and is also, but with less accuracy, applied to certified official copies, admissible without other proof, and filed in the Clerk's office, together with the bill or answer, to be read at the hearing. Exhibits proved by depositions, should either be annexed to them, or so designated as to leave no reasonable doubts of their identity. Dodge *v.* Israel, 4 Wash. 323. In *Georgia*, it is required that copies of all deeds, and writings, and other exhibits be filed with the bill or answer; and no other exhibits are to be admitted, unless by order of Court, for cause shown. Originals, not admitted in the answer, may be required at the hearing; and on application to the Court, or to a Judge in vacation, originals may be ordered to be deposited in the Clerk's office, for the inspection of the adverse party. Rules of the Superior Court, in Equity, 1846, Reg. 17, Hotchk. Dig. p. 955.

ondly, where documents, letters, or other writings, essential to the justice of the cause, have been omitted to be proved before publication. But this is a limited indulgence, granted only to the party who is to use the documents; and is obtained by a special order, granted on motion, after notice to the adverse party, the documents and writings to be proved being described with sufficient particularity, both in the motion and in the order, and the omission of previous proof being satisfactorily accounted for.[1] If a replication has been filed, and the plaintiff's testimony is a mere exemplification of a record, which proves itself, he may read it at the hearing, on giving seasonable notice to the defendant of his intention, so that he may examine witnesses to explain or rebut its effect, if it can be explained.[2] But the course of the Court of Chancery is to confine the proof at the hearing to the verification of exhibits, excluding all examinations as to other facts; and not to refuse a party the liberty of proving them in that mode, where it can be done,[3] unless the execution or authenticity itself of the instrument is expressly denied, and is the point in controversy.[4] If the execution of the instrument is neither admitted nor denied by the defendant, it may be proved *vivâ voce* at the hearing.[5]

§ 310. Though in *the proof of exhibits*, the course of examinations *vivâ voce* at the hearing, in modern practice, *does not necessarily exclude* every question that would admit of a *cross-examination*, yet it is restricted to a few simple points, such as the manual execution of the instrument, by the testimony of the subscribing witness, or by proof of the signature or handwriting of an instrument or paper not attested; or the custody and identity of an ancient document, produced by the librarian or registrar; the accuracy of an office-copy, produced by the proper officer, and the

[1] 2 Dan. Ch. Pr. 1025 – 1030 [* 3d Amer. Ed. 876 – 882]; 1 Hoffm. Ch. Pr. 490; Graves *v.* Budgel, 1 Atk. 444; Barrow *v.* Rhinelander, 1 Johns. Ch. 559; Hughs *v.* Phelps, 3 Bibb, 199; Higgins *v.* Mills, 5 Russ. 287; Consequa *v.* Fanning, 2 Johns. Ch. 481. And see Dana *v.* Nelson, 1 Aik. 252. The liberty thus granted has been extended to the proof of exhibits on a rehearing, or on an appeal, which were not proved at the original hearing, or which have been subsequently discovered. Walker *v.* Symonds, 1 Meriv. 37, n.; Higgins *v.* Mills, *supra;* Dale *v.* Roosevelt, 6 Johns. Ch. 256; Williamson *v.* Hutton, 9 Price, 194.

[2] Mills *v.* Pittman, 1 Paige, 490. And see Pardee *v.* De Cala, 7 Paige, 132; Bachelor *v.* Nelson, Walk. Ch. 449; Miller *v.* Avery, 2 Barb. Ch. R. 582.

[3] Graves *v.* Budgel, 1 Atk. 444; Edgworth *v.* Swift, 4 Bro. P. C. 658.

[4] Att'y-General *v.* Pearson, 7 Sim. 303; Booth *r.* Creswick, 8 Jur. 323.

[5] Rowland *v.* Sturgis, 2 Hare, 520. And see *supra*, § 291 *a*. [* On an *ex parte* application the testimony of the attesting witness to an instrument was dispensed with, there being a difficulty in obtaining his evidence. Dierden *In re*, 10 Jur. N. S. 673.]

like.[1] It is not ordinarily allowed to prove in this mode the handwriting of attesting witnesses who are dead;[2] nor the due execution of a will, involving, as it does, the sanity of the testator;[3] nor a deed that is impeached in the answer, as against the party impeaching it;[4] nor a book or ancient map, not produced by an officer to whom the custody of it officially belonged.[5] But where the instrument or paper is an important document, leave will be granted to postpone the hearing for the purpose of proving it by interrogatories in the ordinary mode.[6] And, in examinations at the hearing, the Court will sometimes permit a cross-examination, and will itself examine, *vivâ voce*, upon the suggestion of any question.[7] The Court will also, in cases in which any exhibit may, by the present practice, be proved *vivâ voce*, at the hearing of a cause, permit it to be proved by the *affidavit* of the witness who would be competent to prove the same *vivâ voce* at the hearing.[8]

§ 311. The formal proof of written documents in a cause does not, merely on that ground, entitle the adverse party to inspect them before the hearing; for it is the settled course of Chancery, not to enable a party to see the strength of his adversary's case, or the evidence of his title, or "to pick holes in the deed," until the hearing of the cause.[9] But where an inspection has been called for and had, the instruments are admissible in evidence for both parties.[10]

[1] Gresl. Eq. Evid. p. 188, 189; 2 Dan. Ch. Pr. 1025, 1026 [* 3d Amer. Ed. 878–879]; Ellis *v.* Deane, 3 Moll. 63; Consequa *v.* Fanning, 2 Johns. Ch. 481; Graves *v.* Budgel, 1 Atk. 444. And see E. of Pomfret *v.* Ld. Windsor, 2 Ves. 472.

[2] Bloxton *v.* Drewitt, Prec. Ch. 64; 2 Dan. Ch. Pr. 1027 [* 3d Amer. Ed. 878, 879].

[3] Harris *v.* Ingledew, 3 P. Wms. 91, 93; Niblett *v.* Daniel, Bunb. 310; Eade *v.* Lingood, 1 Atk. 203.

[4] Barfield *v.* Kelley, 4 Russ. 355; Mahur *v.* Hobbs, 1 Y. & C. 585.

[5] Lake *v.* Skinner, 1 Jac. & Walk. 9; Gresl. Eq. Evid. p. 189.

[6] Bloxton *v.* Drewitt, *supra;* Bank *v.* Farques, Ambl. 145; Clarke *v.* Jennings, 1 Anstr. 173; Mahur *v.* Hobbs, *supra.*

[7] Turner *v.* Burleigh, 17 Ves. 354; Consequa *v.* Fanning, 2 Johns. Ch. 481.

[8] Orders of August 26, 1841, Ord. 43; Law's Pract. U. S. Courts, p. 708. [* In a suit for specific performance of an agreement for a lease, in which there were numerous affidavits, and the testimony very conflicting, an application was made to have an oral examination of the deponents. The application was refused, and it was said by Lord Westbury to be the duty of the judge not to have recourse to oral examination of the witnesses in a cause, unless he feels a difficulty in determining the weight of the evidence, or is in some degree of uncertainty or difficulty as to the side to which his judgment ought to incline. Farrall *v.* Davenport, 5 L. T. N. S. 436. It is well settled both in England and this country that exhibits may be proved by parol, — and such parol evidence may be placed upon record by a bill of exceptions. Gafney *v.* Reeves, 6 Ind. 71.]

[9] Davers *v.* Davers, 2 P. Wms. 410; 2 Stra. 764; Hodson *v.* E. of Warrington, 3 P. Wms. 35; 2 Dan. Ch. Pr. 1030 [* 3d Amer. Ed. 881].

[10] *Ante,* Vol. 1, § 563.

4. WITNESSES.

§ 312. It has already been seen, that in many of the United States, trials of fact, in Chancery, are had upon oral testimony delivered in open Court, in the same manner as in trials at Common Law; and that the inclination of opinion in some other States is in favor of this mode of proof.[1] Nevertheless, it is an ancient and general rule in Chancery, to exclude oral testimony, and to receive none at the hearing except what is contained in written depositions. And as this rule is still acted upon in some of the States, and is partially and in a modified degree still recognized as a leading rule in others, it will be necessary to consider it in this place. The general subject naturally disposes itself into two branches; namely, first, the *competency of the witnesses;* and, secondly, the *manner in which their testimony is obtained.*

§ 313. And FIRST, as to the *competency of witnesses.* The rules of evidence, generally speaking, are the same in Equity as at Law, and every person who is a competent witness at Law, is also competent in Equity. What has been said in the preceding volumes on this subject will therefore not be here repeated. But in certain cases, Courts of Equity go further in this respect than Courts of Law; by examining the parties themselves as witnesses; a practice wholly unknown to the ancient Common Law.[2] We are therefore here to consider in what cases persons, inadmissible as witnesses at Law, are admissible in Equity. These are chiefly *parties to the record;* for third persons, interested in the subject or event of the suit, or otherwise incompetent to testify at Law, are for the same reasons excluded here also.

§ 314. A *plaintiff* in Equity may sometimes *examine a co-plaintiff* as a witness. This is always permitted, when the adverse party consents; the ground for excluding him being his liability

[1] *Supra,* §§ 259, 264, 265. [In *Massachusetts,* it is provided by statute (Gen. Stat. ch. 131, § 60), that "in proceedings in Equity, the evidence shall be taken in the same manner as in suits at Law, unless the Court, for special reasons, otherwise directs; but this shall not prevent the use of affidavits, where they have been heretofore allowed. And in ch. 113, § 21, it is further provided, that "the testimony of witnesses examined orally before a single Justice, upon any matter pending before him, in which an appeal is taken, shall be reported to the full Court; and the Court shall provide by general rules for some convenient and effectual means of having the same reported by the Justice before whom the hearing is had, or by some person designated by him for that purpose. No oral evidence shall be exhibited to the full Court, but the cause shall be heard, on appeal, upon the same evidence as on the original hearing; but the full Court may grant leave to parties in special cases of accident or mistake, to exhibit further evidence, and may provide, by general rules, or special order, for the conditions under, and modes by which, such evidence shall be taken."]

[2] *Ante,* Vol. 1, §§ 329, 348 – 354.

to costs, which rendered him interested in the event of the suit. But if the defendant will not consent, the bill, on motion, and giving security for costs, may be amended by striking out the name of the co-plaintiff to be examined as a witness, and inserting his name as a defendant.[1] If he is only a trustee or a nominal plaintiff, he is a competent witness, of course, on the mere striking out of his name; but if he is not, and he still has an interest in the event of the suit, it must be released.[2] If his interest lies in a part only of the subject of the suit, as to which separate relief may be given, he may be examined in regard to the other part of the subject without a release.[3]

§ 315. The *plaintiff may also examine one of several defendants*, as a witness, as to points in which the defendant examined has no interest, or on which his interest is balanced. Leave for this purpose is granted, of course, on motion and affidavit that the defendant is a material witness, and is not interested in the matters to which he is to be examined; subject to all just exceptions, such as the competency of his testimony, or the like; all which are open to the adverse party at the hearing. The affidavit of his freedom from interest is generally understood to mean only that he is not interested on the side of the party applying. But, though he be not thus interested, yet, if he is interested adversely to the rights of his co-defendants, as, for example, to exonerate himself by charging them, he cannot be examined.[4] Wherever a defendant is thus examined as a witness, he is subject to a cross-examination by the other defendants.[5]

§ 316. This examination of a defendant by the plaintiff, as a witness, *ordinarily operates as an equitable release* to him, so far as regards the matters to which he is interrogated. No decree, therefore, can be had against him, except as to matters wholly dis-

[1] 1 Dan. Ch. Pr. pp. 457, 1037 [* 3d Amer. Ed. 883, 884]; Gresley, Eq. Evid. p. 339; Motteux *v.* Maekreth, 1 Ves. 142; Witts *v.* Campbell, 12 Ves. 493; Helms *v.* Franciscus, 2 Bland. 544. But see Benson *v.* Chester, 1 Jac. 577.

[2] Eckford *v.* De Kay, 6 Paige, 565; Hanley *v.* Sprague, 7 Shepl. 433; Hoffm. Master in Chan. pp. 19, 20; 1 Hoffm. Ch. Pr. 487.

[3] Lingan *v.* Henderson, 1 Bland. 268.

[4] 1 Hoffm. Ch. Pr. 485; 2 Dan. Ch. Pr. 1038, 1039 [* 3d Amer. Ed. 883]; Man *v.* Ward, 2 Atk. 229; Hurd *v.* Partington, 1 Young, 307; Fletcher *v.* Glegg, Id. 345; Ellis *v.* Deane, 3 Moll. 58; Rogerson *v.* Whittington, 1 Swanst. 39; Hardcastle *v.* Shafto, 2 Fowl. 100; Meadbury *v.* Isdall, 9 Mod. 438; Robinson *v.* Sampson, 10 Shepl. 388; Harvey *v.* Alexander, 1 Rand. 219; De Wolf *v.* Johnson, 10 Wheat. 367; Miller *v.* McCan, 7 Paige, 457; Williams *v.* Beard, 3 Dana, 158; Sproule *v.* Samuel, 4 Scam. 135; Taylor *v.* Moore, 2 Rand. 563.

[5] Benson *v.* Le Roy, 1 Paige, 122; Hoffm. Master in Chan. pp. 20, 21; Robinson *v.* Sampson, *supra;* Hayward *v.* Carroll, 4 H. & J. 518; Tallmadge *v.* Tallmadge, 2 Barb. Ch. R. 290.

tinct from those to which he was examined.[1] The reasons of this rule are, that it is inconsistent to allow the plaintiff to call on the defendant to assist him with evidence in his cause, and at the same time to act against him, in respect to the same matters; and also, that by so doing, the other parties may be wronged.[2] If the defendant, who is examined as a witness, is the party primarily liable to the plaintiff, the other defendant being only secondarily liable, the plaintiff cannot have a decree against either, upon *that part of the case* to which the examination was directed.[3] But the general rule we are considering does not apply to the case of a mere formal defendant, such as an executor or a trustee, against whom no personal decree is sought, and who has no personal interest in the subject as to which he is examined; nor to the case of a defendant who, by his answer, has admitted his own absolute liability; or who has permitted the bill to be taken *pro confesso* against him.[4]

§ 317. In some cases, as we have heretofore seen,[5] *a defendant may examine the plaintiff* as a witness. Leave for this purpose may be obtained, wherever the plaintiff is but a nominal party, having no beneficial interest in the property in dispute; and the real party in interest will, in such case, be enjoined from proceeding at law.[6] A co-plaintiff may generally be examined as a witness for the defendant, by consent;[7] but leave will not be granted for one defendant to examine a co-plaintiff as a witness against another defendant, for the purpose of sustaining the bill against him.[8]

[1] Weymouth *v.* Boyer, 1 Ves. 417; Lewis *v.* Owen, 1 Ired. Eq. 93; Palmer *v.* Van Doren, 2 Edw. Ch. 192; Bradley *v.* Root, 5 Paige, 633; Lingan *v.* Henderson, 1 Bland. 268. This rule is now abrogated, and a decree may be had, by virtue of the statute of 6 & 7 Vict. c. 85. See 2 Dan. Ch Pr. 1042. [* See 3d Amer. Ed. 884 for modifications of the statute 6 and 7 Vict. c. 85 by Sts. 14 and 15 Vict. c. 9, and 16 and 17 Vict. c. 83.]

[2] Nightingale *v.* Dodd, Ambl. 583. And see Fulton Bank *v.* Sharon Canal Co., 4 Paige, 127; Thomas *v.* Graham, Walk. Ch. 117

[3] Bradley *v.* Root, 5 Paige, 633. And see Thompson *v.* Harrison, 1 Cox, C. C. 344; Meadbury *v.* Isdall, 9 Mod. 438; Palmer *v.* Van Doren 2, Edw. Ch. 192; Nightingale *v.* Dodd, *supra;* Lewis *v.* Owen, 1 Ired. Eq. R. 290.

[4] Bradley *v.* Root, *supra.* And see Goold *v.* O'Keefe, 1 Beat. 356; Ellis *v.* Deane, 3 Moll. 53; Thompson *v.* Harrison, *supra;* Murray *v.* Shadwell, 2 V. & B. 403. [A trustee may, in general, be a witness. Watertown *v.* Cowen, 4 Paige, 510; Neville *v.* Demeritt, 1 Green, Ch. 321; Drum *v.* Simpson, 6 Binn. 481; Keim *v.* Taylor, 11 Penn. St. R. 163. But if a trustee is entitled to commissions, he is interested; and such interest must be released, before he can be a witness in those jurisdictions where interest renders a witness incompetent, and in those causes where his interest may be affected. Anderson *v.* Neff, 11 Serg. & R. 208; King *v.* Cloud, 7 Penn. St. R. 467.]

[5] *Ante,* Vol. 1, § 361.

[6] Hougham *v.* Sandys, 2 Sim. & Stu. 223; Norton *v.* Woods, 5 Paige, 249. And see Fereday *v.* Wightwick, 4 Russ. 114; Armiter *v.* Swanton, Ambl. 393.

[7] Walker *v.* Wingfield, 15 Ves. 178; Whately *v.* Smith, Dick. 650.

[8] Eckford *v.* De Kay, 6 Paige, 565 In

§ 318. *Co-defendants may also be witnesses for each other.* The rule in Courts of Equity on this subject is founded on the same principle with the rule at Law, which has formerly been stated,[1] namely, that it ought not to be in the plaintiff's power to deprive the real defendant of his witnesses by making them defendants. And this principle applies, and therefore the testimony of a co-defendant may be had, in all cases where he is either a merely nominal defendant, or has no beneficial interest in the matter to which he is to be examined; or his interest or liability is extinguished by release; or is balanced; or where the plaintiff cannot adduce some material evidence against him; or where no decree is sought, or none can be properly had against him.[2] If the witness, who was competent at the time of his examination, is afterwards made a defendant, his deposition may still be read.[3] And it makes no difference that relief is prayed against the defendant proposed to be examined as a witness, if the prayer be founded upon matters other than that to which he is to be interrogated, or, in other words, if his interest be not identical with that of the party who examines him.[4] Regularly, a defendant cannot examine his co-defendant, without an order for that purpose; which will be granted, of course, before the decree, saving all just ex

the States of *New York, Iowa, Indiana, Georgia, Louisiana, Texas,* and *California,* where there is no distinction in the forms of proceeding, between cases at Law and in Equity, provision is made by statute, for the examination of parties by each other as witnesses. In *Mississippi,* and in *Arkansas,* in cases in Equity, the defendant may insert in his answer any new matter of defence, and call on the plaintiff, or any of his co-defendants, as the case may be, to answer it on oath. *Mississippi,* Stat. Feb. 15, 1838, § 1; Ald. & Van Hoes, Dig. App. ch. 7. *Arkansas,* Rev. Stat. 1837, ch. 23, § 34. In several other States it is provided, that the defendant, after he has answered the bill, may exhibit interrogatories to the plaintiff, which he is compelled to answer. See *Ohio,* Rev. Stat. 1841, ch. 87, § 26; *Missouri,* Rev. Stat. 1845, ch. 137, art. 2, §§ 14, 15; *New Jersey,* Rev. Stat. 1846, tit. 33, ch. 1, § 40; *Wisconsin,* Rev. Stat. 1849, ch. 84, § 30; *Alabama,* Code of 1852, § 2914.

[1] *Ante,* Vol. 1, § 358.

[2] Piddock *v.* Brown, 3 P. Wms. 288; Murray *v.* Shadwell, 2 V. & B. 401; Franklyn *v.* Colquhoun, 16 Ves. 218; Dixon *v.* Parker, 2 Ves. 219. And see Whipple *v.* Lansing, 3 Johns. Ch. 612; Neilson *v.* McDonald, 6 Johns. Ch. 201; 2 Cowen, 139; Cotton *v.* Luttrell, 1 Atk. 451; Man *v.* Ward, 2 Atk. 228; Souverbye *v.* Arden, 1 Johns. Ch. 240; Kirk *v.* Hodgson, 2 Johns. Ch. 550; Beebe *v.* Bank N. York, 1 Johns. 577; Reimsdyk *v.* Kane, 1 Gall. 620; Clark *v.* Van Reimsdyck, 9 Cranch, 153; Butler *v.* Elliott, 15 Conn. 187; Hawkins *v.* Hawkins, 2 Car. Law R. 627; Douglass *v.* Holbert, 7 J. J. Marsh. 1; Hodges *v.* Mullikin, 1 Bland, 503; Regan *v.* Echols, 5 Geo. R. 71.

[A defendant may also be a witness against a co-defendant, where he is necessarily a party, and will not be affected by a decree against his co-defendant, and where his testimony is not in favor of his own interest. Farley *v.* Bryant, 32 Maine, 474; Neilson *v.* McDonald, 6 Johns. Ch. 201; Whipple *v.* Van Rensselaer, 3 Ib. 612; Miller *v.* McCan, 7 Paige, 457; Williams *v.* Bean, 3 Dana, 58.]

[3] Cope *v.* Parry, 1 Jac. & Walk. 583; Brown *v.* Greenly, 2 Dick. 504; Bradley *v.* Root, 5 Paige, 632.

[4] Ashton *v.* Parker, 9 Jur. 574; 14 Sim. 632, S. C. And see Daniell *v.* Daniell, 13 Jur. 164; Holman *v.* Bank of Norfolk, 12 Ala. 369.

ceptions, upon suggestion that he is not interested, leaving the question of his admissibility to be determined at the hearing; but after a decree, it is not a motion of course, but is granted only on special circumstances, and upon notice to the plaintiff.[1] [* The evidence taken by any party to a cause may be used by any of the other parties.[2]]

§ 319. Secondly, as to *the mode of taking testimony*. It has already been seen, that in Chancery, the regular course is to receive no testimony orally, except in the mere formal proof of exhibits; and that in several of the State Courts this rule has been abolished, and evidence is received orally, in Equity cases, in the same manner as at Common Law;[3] while in others the old rule has been variously modified. In view of this state of things, Congress, at an early period, expressly empowered the Courts of the United States to regulate the practice therein, as may be fit and necessary for the advancement of justice; and particularly, in their discretion, and at the request of either party, to order the testimony of witnesses in cases in Equity to be taken by depositions, in the manner prescribed by law for the highest Courts of Equity in the States where the Courts of the United States may be holden; except in those States in which testimony in Chancery is not taken by deposition.[4] And more recently, the Supreme Court of the United States has been empowered to prescribe, regulate, and alter the forms of process in the Circuit and District Courts, the forms of pleading in suits at Common Law, in Admi-

[1] 2 Dan. Ch. Pr. 1044; Williams *v.* Maitland, 1 Ired. Eq. 93; Nevill *v.* Demeritt, 1 Green, Ch. 321; Bell *v.* Jasper, 2 Ired. Eq. 597; Hopkinton *v.* Hopkinton, 14 N. Hamp. 315; Paris *v.* Hughes, 1 Keen, 1. [The omission to procure the previous order of the court for the examination of the defendant as a witness, is a mere irregularity, and when it is apparent that no substantial injustice has been done to the other party, an objection on this ground ought not to prevail. Tolson *v.* Tolson, 4 Md. Ch. R. 119.] [* The practice in Ohio is to take the deposition of a co-defendant in Chancery without leave: subject to the right of the adverse party to except to it. Choteau *v.* Thompson, 3 Ohio (N. S.), 424.] By the statute 6 & 7 Vict. c. 85, removing from witnesses the objection of incompetency by reason of interest or infamy, defendants in Chancery may be examined as witnesses for the plaintiff, and also for each other, "saving just exceptions." Whether, under this statute, co-defendants were entitled, *of right*, to examine each other as witnesses, in support of a common defence against the plaintiff, is a point upon which opposite opinions have been held. See Wood *v.* Rowcliffe, 11 Jur. 707, per Wigram, V. C., that they are. Monday *v.* Guyer, Id. 861, 1 De G. & S. 182, per Bruce, V. C., that they are not. [* Where the oath to the answer of a defendant who does not appear to have any interest in the suit, is waived, it seems that his deposition may be taken, or he may be required to testify orally. Butterworth *v.* Brown, 26 Ill. 156. See also Wilson *v.* Allen, 1 Jones Eq. (N. C.) 24.]

[2] [* Sturgis *v.* Morse, 26 Beav. 562.]

[3] *Supra*, §§ 251, 308, 309, 312.

[4] U. S. Stat. 1802, ch. 31, § 25 [2 Stat. at Large, 166]; Stat. 1793, ch. 22, § 7 [1 Stat. at Large, 335].

ralty and *in Equity*, and of *taking testimony* and of entering decrees, and, generally, to regulate the whole practice of the Courts.[1] Pursuant to this authority, *Rules of Practice* have been made, by which, after the cause is at issue, *commissions* may be taken out either in vacation or term-time, to take testimony upon interrogatories filed in the Clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories, on failure of which the commission may be issued *ex parte;* the commissioner to be appointed by the Court or by a Judge thereof. But if the parties agree, the testimony may be taken upon oral interrogatories, propounded by the parties at the time of taking the depositions.[2] Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress, the substance of which has been stated in a preceding volume.[3] But in such case, if no notice has been given to the adverse party, of the time and place of taking the deposition, he may be permitted to cross-examine the witness, either under a commission, or by a new deposition, in the discretion of the Court or Judge.[4]

§ 320. In the *construction of these rules*, it has been held, that in cases of disagreement between the parties as to the form of interrogatories and cross-interrogatories, it should be referred to a master to settle the proper form; subject to an appeal from his decision, which will be reviewed by the Court, at the hearing, upon a view of the whole testimony; and that when exceptions

[1] U. S. Stat. 1842, ch. 188, § 6, Vol. 5, p. 518. In the Judiciary Act of 1789, ch. 20, § 30, 1 Stat. at Large, 88, it was enacted, that "the mode of proof, by oral testimony and examination of witnesses in open Court, shall be the same in all Courts of the United States, as well in the trial of causes in Equity and of Admiralty and Maritime Jurisdiction, as of actions at Common Law." By the subsequent statute of April 29, 1802, ch. 291, § 25, 2 Stat. at Large, 166, the imperative character of this provision was removed, so far as regards suits in Equity, by leaving it "in the discretion of the Court, upon the request of either party, to order the testimony of the witnesses therein to be taken in conformity to the regulations prescribed by law for the Courts of the highest original jurisdiction in Equity, in cases of a similar nature, in that State in which the Court of the United States may be holden; *provided*, however, that nothing herein contained shall extend to the Circuit Courts which may be holden in those States in which testimony in Chancery is not taken by deposition." Conn *v.* Penn, 5 Wheat. 424. Provision is also made, by statute, for reducing oral testimony to writing, to be used in the Supreme Court on appeal, no other testimony being in such cases allowed. Stat. U. S. Sept. 24, 1789, ch. 20, § 19, 1 Stat. at Large, 83; Stat. U. S. March 3, 1803, ch. 93, § 2, 2 Stat. at Large, 244; The Boston, 1 Sumner, 332. [And the parol testimony which was used in the Court below ought to appear upon the record. Conn *v.* Penn, 5 Wheat. 424.]

[2] Rules for Circuit Courts in Equity, Reg. 67. [* And where a party with knowledge of such an oral examination acquiesces in it, he waives his right to require written interrogatories. Van Hook *v.* Pendleton, 2 Blatch. Cir. Ct. 85.]

[3] *Ante*, Vol. 1, §§ 322 - 324.

[4] Rules for Circuit Courts in Equity, Reg. 68.

are intended to be taken to such interrogatories and cross-interrogatories, they should be propounded as objections, before the commission issues, or they will be deemed to be waived.[1] All the interrogatories must be substantially answered. If the cross-interrogatories which were filed are not put to the witness, the deposition, ordinarily, cannot be read; but if the other party has unreasonably neglected to file any, it is at his own peril, and the deposition may, in the discretion of the Court, be admitted.[2] If the commission is joint, it must be executed by all the commissioners;[3] if joint and several, the commissioners are competent to take the depositions of each other;[4] but in either case, if a person not named in the commission appears to have assisted in taking the examination, it is fatal to the admissibility of the deposition.[5]

§ 321. By another Rule,[6] the *time* ordinarily allowed *for the taking of testimony* is three months, after the cause is at issue; but it may be enlarged, for special cause shown. And immediately after the commissions and depositions are returned to the Clerk's office, *publication* may be ordered by a Judge of the Court, or it may be enlarged at his discretion. But publication may at any time pass, in the Clerk's office, by the written consent of the parties, duly entered in the order-book, or indorsed on the depositions or testimony.

§ 322. It is also ordered, by another Rule of the same Court,[7] that after the filing of the bill, and before answer, upon affidavit that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, a commission may issue, as of course, to a commissioner appointed by a Judge of the Court, to take their examination *de bene esse*, upon due notice to the adverse party. These are

[1] Crocker *v.* Franklin Co., 1 Story, R. 169; United States *v.* Hair Pencils, 1 Paine, 400. And see Barker *v.* Birch, 7 Eng. Law & Eq. Rep. 46.

[2] Ketland *v.* Bissett, 1 Wash. C. C. R. 144; Gilpins *v.* Consequa, 3 Wash. 184; Bell *v.* Davidson, Id. 328; Gass *v.* Stinson, 3 Sumn. 98. For the cases in which a deposition will be admitted in Equity, notwithstanding the want of a cross-examination, see *ante*, Vol. 1, § 554. See also, *infra*, ch. 3, § 1.

[3] Armstrong *v.* Brown, 1 Wash. C. C. R. 43.

[4] Lonsdale *v.* Brown, 3 Wash. 404.

[5] Willings *v.* Consequa, 1 Pet. C. C. R. 301.

[6] Rules for Circuit Courts in Equity, Reg. 69. [Where by a rule in chancery, the time allowed for the taking of testimony was limited to four months, but a subsequent statute provided that "in all proceedings in equity the evidence shall be taken in the same manner as in suits at law," it was held, that the statute necessarily supersedes the rules of Court as to the taking and filing of depositions in chancery. Pingree *v.* Coffin, 12 Cush. 600.]

[7] Idem. Reg. 70.

the principal rules, adopted in the national tribunals, which affect the law of evidence in cases in Equity; except such as may hereafter be mentioned. But it is further ordered, that in all cases where the rules prescribed do not apply, "the practice of the Circuit Court shall be regulated by the [then] present practice of the High Court of Chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the District where the Court is held; not as positive rules, but as furnishing just analogies to regulate the practice."[1] And it is to be noted, that it is the practice of the Court of Chancery, and not that of the Exchequer, which thus forms the basis of the Equity practice of the Courts of the United States.[2] The same may be said of the course of practice in Equity in all the State Courts, so far as it has not been changed by express orders or immemorial usage, nor by statutes.

§ 323. When *depositions* are taken under a commission, or by an examiner, the course is for the party to file in the Clerk's office the *original interrogatories* to be propounded to the witnesses he would examine; giving opportunity to the adverse party, by reasonable notice prescribed by the rules, to file his *cross-interrogatories*. These are to be signed by counsel, as a guaranty of their propriety and fitness to be put; after which the commission issues. The attendance of the witness before the commissioner or examiner is obtained by means of a *subpœna;* disobedience to which may be punished by attachment, as a contempt of Court.[3] The course of examination upon interrogatories, and their character as proper to be put, has been sufficiently indicated in a preceding volume, when treating of the examination of witnesses.[4] But it may here be repeated, that the witness can be examined only to matters alleged in the bill or answer, or relevant to the issue.[5]

[1] Idem. Reg. 90.

[2] Smith *v.* Burnham, 2 Sumn. 612. In some of the United States, the practice in Equity, in cases not otherwise regulated, is expressly ordered to be in conformity to the Rules of Practice made by the Supreme Court of the United States. See *Pennsylvania*, Dunlop's Dig. ch. 525, § 13, p. 834; [West *v.* Paige, 1 Stockt. (N. J.) 203; Burrall *v.* Eames, 5 Wis. 260.]

[3] Rules for Circuit Courts in Equity, Reg. 78.

[4] *Ante*, Vol. 1, §§ 431–469.

[5] The question whether, where a fact is charged and put in issue in a bill, the examination of witnesses to the conversations of the defendant are admissible to prove the fact unless such conversations are expressly charged in the bill, as evidence of such fact, is a question upon which there is some diversity of opinion. The rule of practice in England seems to exclude the evidence in such cases. 2 Dan. Ch. Pr. 995, 996. But the authorities cited in support of the rule were reviewed with critical acumen, and the principle clearly expounded, in Smith *v.* Burnham, 2 Sumn. 612, by Story, J., who held that the evidence was admissible. In that case it was stated, in general terms, in the bill, that

Though interrogatories may be referred for scandal, it is doubtful whether they can be referred for mere impertinence;[1] but if the

the defendant, at divers times, had spoken of the title in controversy as one belonging to the partnership claimed by the plaintiff; but the particulars of the time, place, and circumstances of the admissions were not stated in the bill. The interrogatories, filed by the plaintiff to elicit these conversations were, on the defendant's petition, referred for impertinence; and the report of the master, which allowed them, being excepted to, the learned Judge, in disposing of the exception, vindicated his dissent from the English rule, in an argument best stated in his own language. "The case of Hall *v.* Maltby," he observed "(6 Price, R. 240, 258, 259), is relied on in support of the exception; and certainly, if the language of that decision is to be taken in its full latitude, it is directly in point. In that case there was a charge of a fraudulent withdrawal of a tithable sheep from tithes; and Chief Baron Richards, at the hearing, rejected the evidence of conversations of the defendant, establishing the fact; because, though the fraudulent withdrawal was charged in the bill, the conversations were not." Id. p. 614. "It is true that, in this case, there was a charge of fraud; and the Chief Baron seems to rely on that as important to his decision. And Lord Chancellor Hart, in Mullonland *v.* Hendrick (1 Molloy, R. 359; S. C. Beatt. R. 277), in affirming the same doctrine, seems to have placed some reliance on the same fact, of its being a charge of fraud, considering fraud as an inference of law from facts, and not a mere fact. In other cases, however, he does not seem to rely on any such distinction. Indeed, it is very difficult to understand the ground of such a distinction. The facts to be established by such confessions, and conversations, and admissions, are not so much fraud in the abstract, as evidence conducing to establish it. If, upon a charge of fraud in a bill, stating that certain acts done were fraudulently done, evidence of confessions, admitting the acts and the intent, cannot be given in evidence, unless those confessions are also charged in the bill, as evidence of the fraud; it seems to me, that the principle of the rejection of the evidence must apply equally to all other cases of confessions to establish facts, which are to prove any other charge in a bill. Take the present case. The main object of the bill and interrogatories is, to establish a partnership in certain transactions between the plaintiff and defendant, out of which certain rights of the plaintiff have sprung, which he seeks to enforce by the bill. The confessions and admissions are not charged in the bill; but the partnership is. Now, partnership itself is not, in all cases, a mere matter of fact, but is often a compound of law and fact. And I cannot see a single ground, upon which the evidence of confessions and admissions ought to be rejected in the case of a charge of fraud, which does not equally apply to the charge of partnership. In each case the evidence is, or may be, equally a surprise upon the party; and in each of them he is equally prevented from giving, by his answer, such denials and explanations, as may materially affect the whole merits of the cause. It seems to me, then, that the doctrine, if it exists at all, must equally apply to all cases, where the fact charged in respect to which the confessions, conversations, or admissions are offered, as proofs, constitutes the gist of the matter of the bill. And yet I do not understand that such a doctrine, so universal, is anywhere established, unless it is so in Ireland by Lord Chancellor Hart, who has discussed the subject in a variety of cases, and seems to assert it in broad terms. He has expressly refused to apply it to cases, where written papers, letters, or documents, are relied on as proofs of general facts charged in the bill; although such papers, letters, and documents are not charged as proofs in the bill (Fitzgerald *v.* O'Flaherty, 1 Molloy, R. 350); unless, indeed, those papers, &c., are relied on as confessions of the party, which he treats as an exception to the general rule of evidence. 'The general rule' (said he on one occasion) 'is, that all evidence, intended to be relied on at the hearing, should be founded on some allegation, distinctly put on record, of fact, which it is calculated to support.' 'It is a very old principle to be found very clearly stated in Vernon (Whaley *v.* Norton, 1 Vern. R. 483), but I must be greatly misread, if the evidence, and not only the fact to be proved by the evidence, must be put in issue, to entitle the evidence to be read.' He repeated the same remark with the same exception in Blacker *v.* Phepoe (1 Molloy, R. 357, 358). The doctrine of Lord Chancellor Hart, to be deduced from all the cases decided by him, seems to be this: that, wherever confessions, conversations, or admissions of the

[1] Cox *v.* Worthington, 2 Atk. 236; White *v.* Fussell, 19 Ves. 113; Pyncent *v.* Pyncent, 3 Atk. 557.

witness would object to an interrogatory for this latter cause, he must do it by demurrer, before he answers.[1] But this right to de-

defendant, either oral or written, are relied on in proof of any facts charged in the bill, they are inadmissible, unless such confessions, conversations, or admissions are charged in the bill; because they operate as a surprise upon the party, and he is deprived of any opportunity to deny or explain them in his answer. He admits the general rule to be the other way; and insists upon this as an exception to it. The question, then, really is, whether the exception, either in its general form, as asserted by Lord Chancellor Hart, or in its qualified form, as asserted by Lord Chief Baron Richards, has a real foundation in Equity jurisprudence. Both of these learned Judges rely on the case of Evans *v.* Bicknell (6 Ves. R. 174), in which they were counsel on opposite sides, to support that doctrine. Lord Chief Baron Richards says, that it was so decided in that case. Lord Chancellor Hart does not agree to that; but admits, that he drew the bill in that case with a full knowledge of the exception. It is very certain, that the point was not decided in the case of Evans *v.* Bicknell, if we are to trust to the printed report in 6 Ves. R. 174. And, upon the state of the pleadings, I do not see how the point could have arisen." Id. pp. 616–618. "The case of Evans *v.* Bicknell (6 Ves. R. 176, 189, 192), does not sustain the doctrine of Lord Chief Baron Richards, or of Lord Chancellor Hart; and I have not been able to find a single decision in the English Court of Chancery, which does sustain it. And yet if the doctrine had been well established, it seems to me almost impossible that it should not be found clearly stated in the books, as it must be a case of so frequent recurrence in practice. On the contrary, it seems to me, that the case of Earle *v.* Pickin (1 Russ. & Mylne, R. 547), shows, that no such rule is established in Chancery." Id. p. 621. "If, then, in the absence of authority in favor of the rule we look to principle, it seems to me impossible that it can be supported. There is no pretence to say, that in general it is true, that, as to the facts to be put in issue, it is necessary, not only to charge these facts in the bill, but also to state in the bill the materials of proof and testimony, by means of which these facts are to be supported. Lord Chancellor Hart has admitted this in the fullest manner, saying: 'The evidence of facts, whether documentary or not, need not be put in issue; evidence of confessions, whether documentary or not, must.' Why admissions or conversations, as materials of proof, should be exceptions from the general practice, I profess myself wholly unable to comprehend. Other papers and testimony may be quite as much matters of surprise, as documents or testimony, as conversations or admissions; and the circumstance, that conversations or admissions are more easily manufactured than other proofs, furnishes no ground against the competency of such evidence, but only against its cogency as satisfactory proof.

"Two grounds are relied on to support the exception. The first is, that the defendant may not be taken by surprise, and (as it has been said), admitted out of his estate; but may have an opportunity to cross-examine the witnesses. The second is, that the defendant may have an opportunity, in his answer fully to deny, or to explain the supposed admissions or conversations. Now, the former ground is wholly inapplicable to our practice, where the interrogatories and cross-interrogatories put to every witness are fully known to both parties; and, indeed, in the laxity of our practice, where the answers of the witness are usually as well known to both parties. So that there is no general ground for imputing surprise. Indeed, in this very case, it is admitted by the learned counsel for the defendant, that there has not been any surprise. The second ground is applicable here. But, then, proofs, documentary or otherwise, may be offered as evidence of facts charged in the bill, as well as admissions and conversations, which it might be equally important for the defendant to have an opportunity to deny or to explain, in order to support his defence. Yet the evidence of such facts is not, therefore, inadmissible. So that the exception is not coextensive with the supposed mischief.

"But it seems to me that the exception would itself be productive of much of the mischief, against which the practice of the English Court of Chancery is designed to guard suitors. In general, the testimony to be given by witnesses in a cause at issue in Chancery, is studiously concealed until

[1] Parkhurst *v.* Lowten, 2 Swanst. 194. And see Bowman *v.* Rodwell, 1 Madd. 266; Langley *v.* Fisher, 5 Beav 443. The demurrer, if the court can dispose of the question in that shape, will be tried in that form at once, without reserving it until the hearing. Carpmael *v.* Powis, 1 Phill. Ch. Ca. 687.

mur is only where the impertinence relates to himself; he cannot object to an interrogatory because it is immaterial to the matter in

after publication is formally authorized by the Court. The witnesses are examined in secret upon interrogatories not previously made known to the other party. The object of this course is to prevent the fabrication of new evidence to meet the exigencies of the cause, and to take away the temptations to tamper with the witnesses. Now, if the exception be well founded, it will (as has been strongly pressed by counsel) afford great opportunities and great temptations to tamper with witnesses, who are known to be called to testify to particular admissions and conversations. So that it may well be doubted, whether, consistently with the avowed objects of the English doctrines on the subject, such an exception could be safely introduced into the English Chancery. There is another difficulty in admitting the exception; and that is, that there is no reciprocity in it; for while the defendant in a suit would have the full benefit of it, the plaintiff would have none, since his own admissions and conversations might be used, as rebutting evidence, against his claims asserted in the bill, although they were not specifically referred in the answer.

"Several cases have been referred to, both in the English and the American Reports, in which the case has been mainly decided upon the admissions or conversations of the parties, which were not specifically stated in the bill, or other pleadings. I have examined those cases; and although it is not positively certain, that there were not in any instance, any such admissions or conversations charged in the bill, yet there is the strongest reason to believe that such was the fact; and no comment of the counsel or of the Court would lead us to the supposition, that there was imagined to be any irregularity in the evidence. I allude to the cases of Lench *v.* Lench (10 Ves. R. 511); Besant *v.* Richards (1 Tamlyn, R. 509); Neathway *v.* Ham (1 Tamlyn, R. 316); Necot *v.* Barnard (4 Russ. R. 247); Park *v.* Peck (1 Paige, R. 477); Marks *v.* Pell (1 Johns. Ch. R. 594), and Harding *v.* Wheaton, (11 Wheat. R. 103; s. c. 2 Mason, R. 375). So far as my own recollection of the practice in the Courts of the United States has gone, I can say, that I have not the slightest knowledge that any such exception has ever been urged in the Circuit Courts, or in the Supreme Court, although numerous occasions have existed, in which, if it was a valid objection, it must have been highly important, if not absolutely decisive. Until a comparatively recent period, I was not aware that any such rule was insisted on in England or America, notwithstanding the case of Hall *v.* Maltby (6 Price, R. 250, 252, 258). Indeed, Mr. Gresley, in his late Treatise on Evidence, has not recognized any such rule, although in one passage the subject was directly under his consideration, and he relied for a more general purpose on that very case. If it had been clearly settled in England, it would have scarcely escaped the attention of any elementary writer, professedly discussing the general doctrines of evidence in Courts of Equity.

"My opinion is, that the principle to be deduced from the case in 6 Price, R. 250, before the Lord Chief Baron Richards, supported as it is by the other cases already cited before Lord Chancellor Hart, is not of sufficient authority to establish the exception contended for, as an exception known and acted upon in the Court of Chancery in England, whose practice, and not that of the Court Exchequer, furnishes the basis of the equity practice of the Courts of the United States. I have a very strong impression that, in America, the generally received, if not the universal practice, is against the validity of the exception. If the authorities were clear the other way, I should follow them. But if I am to decide the point upon general principles, independent of authority, I must say, that I cannot persuade myself that the exception is well founded in the doctrines of equity jurisprudence, as to pleadings or evidence.

"The exception, therefore, to the master's report must be overruled. It would be a very different question, if the bill should contain no charges, as to admissions or conversations of the defendant, and the defendant should be surprised at the hearing by evidence of such admissions and conversations in support of the facts put in issue, whether the Court would not, for the purpose of justice, enable the defendant to countervail such evidence, by giving him leave to offer other evidence, explanatory or in denial of it, upon reference to the master, or by an issue, as was done in the case of Earle *v.* Pickin (1 Russ. & Mylne, R. 447). I imagine, that one reason why, when evidence of admissions or conversations of the defendant is intended to be introduced, in support of facts charged in the bill, and put in issue, such admissions and conversations are so often charged in the bill, is to avoid the

issue, for this is the right of the party alone.[1] Usually, but not necessarily, the interrogatories are closed by what is termed the general interrogatory, the form of which is prescribed in the Rules,[2] and if propounded, this also must be answered as well as the others, or the deposition will be suppressed.[3] If a material

very difficulties in which the omission must leave the cause; viz. the little confidence which the Court would give to it, as a species of evidence easily fabricated, and the inclination of the Court to endeavor, by a reference or an issue, to overcome its force.

"I have not thought it necessary, in the view which has been taken of the exception to the report of the master, to consider with much care the other objection made to the exception; to wit, that the admissions and conversations are sufficiently charged in the bill to let in the evidence even if the rule were as the plaintiff's counsel has contended it to be. The only charge bearing on this matter is, that 'at all the times aforesaid, as well as at divers other times, through all the negotiations aforesaid, as well as in many other negotiations in relation to the contract aforesaid, the said Daniel Burnham (the defendant) constantly spoke of the said interest in the said lands of the said Black as belonging to the said copartnership, and spoke of, recognized, and treated your orator as having an equal and copartnership right therein.' This language is somewhat indeterminate; for it is not charged whether the defendant spoke to the plaintiff or to third persons; and no persons in particular are named, with whom he held any conversations on the subject. If the rule contended for existed, I should greatly doubt whether such an allegation, in such loose and uncertain terms, was a sufficient compliance with it; for it would lie open to all the objections against which the rule is supposed to be aimed. The defendant, to so general a charge, could do no more than make a very general answer. So that he would be deprived of all the benefit of all explanations and denials of particular conversations. But it is unnecessary to dwell on this point, as the other is decisive." Id. pp. 622–627.

The same question was, eight years afterwards, again raised before this learned Judge, in Jenkins *v.* Eldredge, 3 Story, R. 183, who adhered to his former opinion, expressing himself as follows: "But here we are met by an objection, — that much of the evidence stands upon confessions and statements made by Eldredge, and testified to by the witnesses, which are not charged in the bill, so as to let them in as proper evidence. And in support of this objection, among other cases, Hughes *v.* Garnett (2 Younge & Coll. 328); Graham *v.* Oliver (3 Beavan, R. 124); Earle *v.* Pickin (1 Russ. & Mylne, 547); and especially Atwood *v.* Small (6 Clark & Finnell. R. 360), are cited. I had occasion, in the case of Smith *v.* Burnham (2 Sumner, R. 612), fully to consider this whole matter; and I remain of the opinion then expressed, that there is no difference, and ought to be no difference, in cases of this sort, between the rules of a Court of Law and those of a Court of Equity, as to the admission of such evidence. Its admissibility may, however, be properly subject, under particular circumstances, to this qualification (which Lord Cottenham is said to have supported), that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it. This course may be a fit one, in cases where, otherwise, gross injustice may be done; but I consider it as a matter resting in the sound discretion of the Court, and not strictly a rule of evidence. But whatever may be the rule of evidence in England on this point, it is not so in America; and our practice in Equity causes, where the evidence is generally open to both parties, rarely can justify, if, indeed, it ever should require, the introduction of such a rule. Mr. Vice-Chancellor Wigram, in Malcolm *v.* Scott (3 Hare, R. 39, 63), seems to me to have viewed the rule very much under the same aspect as I do. But, at all events, the practice is entirely settled in this Court, and I, for one, feel not the slightest inclination to depart from it, be the rule in England as it may." 3 Story, R. 283, 284. See also Story, Eq. Pl. § 265 *a*, note; *Ante*, Vol. 1, § 171, note.

[1] Ashton *v.* Ashton, 1 Vern. 165; Tippins *v.* Coates, 6 Hare, 21; Langley *v.* Fisher, 9 Jur. 1066; 5 Beav. 443.

[2] Rules for Circuit Courts in Equity, Reg. 71.

[3] See *supra*, § 320; Richardson *v.* Golden, 3 Wash. 109.

part of the evidence comes out under the general interrogatory, this is no valid objection to the deposition.[1]

§ 324. In *taking the examination* upon written interrogatories, the witness having been duly sworn, the commissioner or examiner is to *put the interrogatories singly and seriatim*, in the order in which they are written; and may explain to the witness their import and meaning; but should not permit him to read or hear any other interrogatory, until the one already propounded be fully answered; nor unnecessarily to depart until the examination is concluded. The answers must be written down by the commissioner, or examiner, or by his clerk in his presence and under his direction; after which, the whole is to be distinctly read over to the witness, and signed by him.[2] He may make any correction in his testimony, by an explanatory addition thereto, at any time before he departs from the presence of the commissioner or examiner, though the examination be signed and closed; but not afterwards, unless by leave of the Court for that purpose.[3] The depositions

[1] Rhoades *v.* Selin, 4 Wash. 715.

[2] 2 Dan. Ch. Pr. 1061–1064, 1088–1090 [* 3d Amer. Ed. 916–920, 936, 937]. It is to be remembered, that witnesses may always be examined *vivâ voce*, by consent of parties, either by the parties or their counsel, or by the commissioner or examiner, or by a master if the case is before him. See Story *v.* Livingston, 13 Peters, 359, 368; Rules for Circuit Courts in Equity, Reg. 78.

[3] 2 Dan. Ch. Pr. 1064, 1089 [* 3d Amer. Ed. 920, 936]; Abergavenny, Ld., *v.* Powell, 1 Mer. 130. And see Griells *v.* Gansell, 2 P. Wms. 646; 2 Eq. Cas. Abr. 59, pl. 6, S. C.; Kingston *v.* Tappen, 1 Johns. Ch. 368. The course of proceedings pursued by Examiners in England is stated by Mr. Plummer, in his answers returned to the Chancery Commission, in the following terms: —

"The Examiners are two in number; one examines the plaintiff's witnesses, the other the defendant's. A set of interrogatories, engrossed on parchment, with counsel's name attached, is brought to the office by the solicitor, and lodged with the sworn clerk. This is called filing interrogatories.

"The solicitor, at the same time, usually makes an appointment for the attendance of witnesses to be examined upon them, and secures one, two, or more days, as he supposes the examination will occupy. Upon the witnesses attending, they are taken up by the sworn clerk to the six clerks' office, and produced at the seat of the clerk in Court for the opposite party; and a note of the name, residence, and description of each witness is left there. From the six clerks' office the witnesses proceed with the same officer to the public office, where they are sworn before the Master in Chancery, who certifies that fact, by affixing a memorandum of it upon the interrogatories, in the following form: —

"'A. B. and C. D., both sworn before me at the public office, this —— day of ——,'

(Signed.)

"The examination bears date from the time of the witnesses being sworn, though they may, perhaps, not be examined for several days afterwards.

"If the witness is prevented, by age or infirmity, from attending in person, an order is obtained that he may be examined at his own residence; and in that case the Master in Chancery attends there to administer the oath, and the Examiner to take his deposition.

"If, after the witnesses have been sworn, any alteration is made in the title, or any other part of the interrogatories, they must be resworn, but not reproduced.

"Before the witnesses are examined, the Examiner ought to be, and generally is, furnished by the solicitor with instructions, as to which of the interrogatories each witness is to be examined upon.

"The solicitor, also, supplies a minute of the evidence he expects his witnesses to

are then certified by the commissioner or examiner, and sealed up, with the commission or order of Court, on the back of which his doings are certified; and the whole is returned to the Court within the time limited by the rules. If a witness does not understand the English language, the commissioner, *virtute officii*, may appoint an interpreter,[1] who should be sworn truly to interpret be-

give; but of such paper no use can be made in the examination. On the return of the witness to the Examiner's office, from being sworn, they are examined separately, and in secret (that is, without any third person being present), by the Examiner, who reads over the interrogatories successively, and takes down the answer in writing, concluding the answer to each interrogatory before the following one is put. The Examiner considers himself bound, and strictly bound, to adhere to the record; but if an ambiguity occurs in the interrogatory, and the witness does not strictly comprehend its meaning, the Examiner feels himself at liberty to give an explanation; and, if necessary, as is frequently the case with country witnesses and unprofessional persons, to couch it in less technical and more familiar language; taking care, however, that the answer ultimately elicited and recorded shall be strictly an answer to the terms of the interrogatory.

"When all the interrogatories, upon which the Examiner was intrusted to examine the witnesses, have been thus gone through, the Examiner carefully reads over the whole deposition to the witness, who, if he be satisfied with it, signs each sheet of it in the presence of the Examiner. If, however, the witness, upon consideration, wishes to vary his testimony, or to make any alteration in or addition to it, he is at liberty to do so before signing the deposition.

"After the deposition has been signed, and the witness has left the office, the rule is almost invariable, that no further alteration or addition can be made without special leave of the Court. The only exceptions are, where a witness, speaking from recollection of the contents of a written document, finds, on referring to the document, that he has made a mistake in a date or sum. Upon the document being produced to the Examiner, he considers himself at liberty to correct the error. Or, where the witness can satisfy the Examiner that the statement sought to be added was actually made to the Examiner during the examination, but inadvertently omitted to be taken down by him, the Examiner considers that he may supply his own omission; the principle in both cases being, that the evidence could not be of subsequent manufacture. The same witness cannot be re-examined upon the same interrogatories, or to the same matter, without an order of the Court; but he may, at any time before publication passes, be examined upon any one or more of the interrogatories already filed, upon which he was not previously examined; or additional interrogatories may be filed for the further examination of a witness previously examined, provided they are not to the same points.

"If the opposite party intends to cross-examine, notice of that intention is left with the Examiner who examines the witnesses in chief; the cross-interrogatories are filled with the other Examiner; and the witness, after having completed his examination in chief, attends at the other office to be examined upon them.

"The depositions, when taken, remain with the Examiner, who is bound by oath not to communicate their contents to either party until the time expires within which, according to the rules of the Court, both sides must have concluded their evidence. Publication (as it is termed) then passes. This time is frequently extended, by order, or consent of parties. When publication has passed, the Examiner gives out the original depositions to the sworn or copying clerk, who makes copies of them for the parties, when ordered by them. To the copy of the depositions made for the opposite party, a copy of the interrogatories is added; but the party who filed the interrogatories does not take a copy of them. Each copy is signed by the Examiner, to authenticate it, and, upon its being taken away, the fees due to the office are paid. Every document or exhibit, referred to in the deposition, is also signed by the Examiner, before it is returned to the party producing it." See Gresley, Eq. Evid. pp. 63–72. And see 1 Hoffm. Ch. Pr. 462–464.

[1] Amory *v.* Fellowes, 5 Mass. 225, 226; Gilpins *v.* Consequa, 1 Pet. C. C. R. 88. But Lord Nottingham established a rule, that no alien should be examined as a witness, without a motion first made in Court to swear an interpreter, so that the other

tween the commissioner and the witness; and the answers of the witness are to be taken down in English, through the interpreter.[1]

§ 325. Testimony may also be taken *in perpetuam rei memoriam*, by a commission, issued pursuant to a bill filed for that purpose; which every Court, having general jurisdiction in Equity, has inherent power to sustain.[2] The commission is executed as in other cases. But as this subject is regulated by statutes in most of the United States, and the mode of taking depositions has been stated in a preceding volume,[3] with as much particularity as the nature of this treatise will permit, it will not, in this case, be further pursued.

§ 326. In regard to the *admissibility* of depositions in Equity, it is held, that where depositions, not legally entitled to be read, are admitted *by consent* of parties, this consent is coextensive with the cause, and under it the depositions may be read at every future hearing of the same cause, whether it be in the higher Court, on appeal, or in the same Court, after the decree has been reversed in the appellate Court, and the cause remanded for further proceedings.[4] And depositions, read at the hearing, are also admissible in evidence on the trial of an issue out of Chancery.[5] If they have once been *read without objection* in the Court below, this is evidence of consent, entitling them to be read in the higher Court, on appeal.[6] The deposition of the party himself, in a bill

side may know him and take their exceptions to him. 2 Swanst. 261, n. When a commission is sent abroad, it is usual to insert a special direction to employ an interpreter, if necessary. Lord Belmore *v.* Anderson, 4 Bro. Ch. C. 90. But this is superfluous; especially if they are authorized, in general terms, to examine such or such other witnesses as may come before them; for the interpreter is a witness. 5 Mass. 226.

[1] Lord Belmore *v.* Anderson, 4 Bro. Ch. C. 90; 2 Cox, 88, S. C.; 2 Dan. Ch. Pr. 1063, 1088; Gresley, Eq. Evid. 119; Smith *v.* Kirkpatrick, 1 Dick. 103. At law, a deposition taken abroad is admissible, though it be written, signed, and sworn in a foreign language, and some weeks afterwards translated and certified under oath by the interpreter; the translation being annexed to and returned as part of the return to the commission. Atkins *v.* Palmer, 4 B. & Ald. 377. No good reason is perceived why it should not be equally admissible in Equity.

[2] See Story, Eq. Pl. §§ 300–306; *Ante*, Vol. 1, 324, 325. [* In Ellice *v.* Roupell, 9 Jur. N. S. 530, Sir J. Romilly, M. R., declares that the proper mode of examining the defendant, where it is desired to perpetuate his testimony, in regard to the matter in which his interest is adverse to that of the plaintiff, is the same as that of examining all other witnesses, and it is only by so examining him, that his deposition can be made evidence at any future period, in another suit. The rule in regard to bills for perpetuating testimony is here stated to be that the defendants, by consenting to answer the plaintiff's bill, admit his right to examine witnesses in the case, and that implies all that is demanded in the bill. For if there is really any *bonâ fide* controversy between the parties, the right to perpetuate the testimony follows as matter of course.]

[3] See *ante*, Vol. 1, §§ 320–325. See also Gresley, Eq. Evid. 129–135; 3 Monthly Law Reporter, 256.

[4] Vattier *v.* Hinde, 7 Pet. 152; Hinde *v.* Vattier, 1 McLean, 110.

[5] Austin *v.* Winston, 1 Hen. & Munf. 33.

[6] Johnson *v.* Rankin, 3 Bibb, 86; Gibbs *v.* Cook, 4 Bibb, 535.

of revivor, taken before the death of the original complainant, and while the deponent had no interest in the suit, is evidence for him at the final hearing.[1] So, if the deposition of the plaintiff is taken under an order obtained by the defendant, it is admissible in evidence for the plaintiff, though it goes to support his case.[2] But if the deponent becomes interested in the subject of the controversy, during the period between the beginning and the end of his examination, that portion of his testimony which was given before his interest commenced may, in the discretion of the Court, be received, if it be complete and distinct as to the matters of which he speaks; and every part of his answers, as to matters to which his interest does not relate, will be received.[3] But no deposition will be admitted to be read, against a party brought in after it was taken, or too late to exercise the right of cross-examination.[4] Depositions *taken in another suit*, between the same parties or their privies in estate, may also be read at the hearing, after an order obtained for that purpose.[5]

§ 327. The rules and principles, by which the examination of witnesses is conducted in Equity, are in general the same which have been stated in a preceding volume as applied in Courts of Law; and therefore require no further notice in this place.[6]

### 5. INSPECTION IN AID OF PROOF.

§ 328. Trial by inspection, or personal examination of the subject of controversy, by the Judge, was anciently familiar in the Courts of Common Law;[7] and though, as a formal and distinct

[1] Hitchcock *v.* Skinner, 1 Hoffm. Ch. R. 21; Brown *v.* Greenley, 2 Dick. 504.

[2] Lewis *v.* Brooks, 6 Yerg. 167.

[3] O'Callaghan *v.* Murphy, 2 Sch. & Lefr. 158; Fream *v.* Dickinson, 3 Edw. Ch. R. 300; 2 Dan. Ch. Pr. 1064. And see *ante*, Vol. 1, § 168; Gresley, Eq. Evid. 366, 367; Haws *v.* Hand, 2 Atk. 615; Gosse *v.* Tracy, 2 Vern. 699; 1 P. Wms. 287, S. C.; Cope *v.* Parry, 2 Jac. & Walk. 538.

[4] Jones *v.* Williams, 1 Wash. 230; Clary *v.* Grimes, 12 G. & J. 31; Jenkins *v.* Bisbee, 1 Edw. Ch. R. 377. And see *ante*, Vol. 1, §§ 426, 554; Pretty *v.* Parker, 1 Cooper, 38, n.

[5] 2 Dan. Ch. Pr. 1011–1016 [* 3d Amer. Ed. 865–869]; Brooks *v.* Cannon, 2 A. K. Marsh. 525; *Ante*, Vol. 1, §§ 523, 525, 552, 553. [* Leviston *v.* French, 45 N. H. Rep. 21. In Lawrence *v.* Maule, 4 Drew. 479, it is held that, where upon an issue between parties, the testimony of a witness since deceased has been received, which either of those parties might use against the other, that evidence may be used between the same parties, in any subsequent proceedings on the same issue; and in Williams *v.* Williams, 10 Jur. N. S. 608, the general rule is stated thus by Sir R. T. Kindersley, V. C.: "The principle upon which the Court acts in these cases is, that if there is another suit instituted between the same parties or their representatives, and the issue is substantially the same in both, that which would be, and in fact was, evidence in the former suit may be read in the latter, and the Court may so order it to be used, "saving all just exceptions."]

[6] See *ante*, Vol. 1, §§ 431–469. See also 2 Dan. Ch. Pr. 1045–1051 [* 3d Amer. Ed. 908–915].

[7] 3 Bl. Comm. 331; 9 Co. 30.

mode of trial, it has fallen into disuse, yet as a matter of proof, ancillary to other testimony, parties are still permitted, in all our tribunals, to exhibit to the Court and Jury, persons, models, and things not cumbrous, whenever the inspection of them may tend to the discovery of the truth of the matter in controversy. In Courts of Law, however, this is only permitted, or, at furthest, sometimes suggested by the Judge; it being seldom, if ever, ordered; but in Courts of Equity, the Judge will often order the production of such subjects before him, for his own better satisfaction as to the truth. Thus he will order an *infant* to be produced in Court for satisfactory proof of his existence, age, and discretion; or an *original document* or *book*, to be satisfied of its genuineness and integrity, or its age and precise state and character; or the like.[1] And where the subject is immovable, the Court will order the party in possession to permit an inspection by witnesses.[2]

§ 329. But it is in bills of injunction, to restrain the violation of *patent rights* and *copyrights*, that this power of a Court of Equity is most frequently called into exercise. In the case of patents, nothing is more familiarly seen than the machine or instrument itself, or an accurate working model, under inspection at the hearing. But in these cases it is not unusual, and in those of copyrights it is almost the invariable course to refer it to a master or other competent person, who for this purpose represents the Court, to compare critically the machine, map, book, work of art, or invention, claimed as original, with that which is alleged to be piratical and spurious, and to report their opinion to the Court;[3] though in cases easily capable of decision upon a brief inspection, without too great a demand upon the time of the Judge, he will examine and decide for himself.[4]

### 6. FURTHER INFORMATION REQUIRED BY THE COURT.

§ 330. The right of the Judge to require further proof upon any point under his consideration, without the motion and even against the will of the parties, is peculiar to Courts proceeding according to the course of Chancery. At Common Law, no such

[1] Gresley, Eq. Evid. 451–454; Comstock *v.* Apthorpe, 8 Cowen, 386; Hopk. Ch. R. 143, S. C. And see *Louisiana*, Code of Practice, art. 139.

[2] Kynaston *v.* E. Ind. Co, 3 Swanst. 249.

[3] Gyles *v.* Wilcox, 2 Atk. 141; Carnan *v.* Bowles, 2 Bro. Ch. C. 80; Leadbetter's case, 4 Ves. 681; Mawman *v.* Tegg, 2 Russ. 385; Gray *v.* Russell, 1 Story, R. 11; 2 Story, Eq. Jur. § 941.

[4] Butterworth *v.* Robinson, 5 Ves. 709; Sheriff *v.* Coates, 1 Russ. & My. 159; *Ex parte* Fox, 1 V. & B. 67.

power is recognized; the Courts being obliged to try and determine the issue, upon such proofs as the parties may choose to produce before them, the Jury finding the fact forthwith, according to the balance of the evidence in favor of the one side or the other. But in Chancery, the Judge may not only postpone his judgment, but if he deems the evidence unsatisfactory, or is unable to solve the question upon the proofs already in the case, or from his own resources, he may require further information. This right of the Judge is inherent in his office, and does not depend on any consent of the parties, nor whether the matters of which he would inquire have been put in issue by the pleadings. It may even be matter which both parties would fain conceal from his notice; as in the case supposed by Sir Thomas Plumer, M. R., of a bill for the specific performance of a contract for the purchase of a cargo, which, in the course of the evidence, would appear to have been smuggled; or where the principal transaction involved another which was illegal;[1] or, it may be matter possibly affecting the interests of persons not before the Court.

§ 331. One of the modes in which this right is exercised is by examining witnesses *vivâ voce*, in open Court. Ordinarily, as we have seen, this course is not resorted to, except for the formal proof of exhibits. But it is employed in cases of *contempt*;[2] and in questions as to the *proper custody of a ward*;[3] and in other cases of emergency, immediately addressed to the discretion of the Judge, or upon which he entertains doubt.[4]

§ 332. Another of these modes is by *reference to a master*, his office being a branch of the Court, whose instructions, therefore, he is bound implicitly to follow.[5] The subjects of such reference, which are numerous, may be distributed under three general heads, namely, the protection of absent parties against the possible neglect or malfeasance of the litigants;—the more effectual working out of details, which the Judge, sitting in Court, is unable to investigate;—and the supplying of defects or failures in evidence.[6]

[1] Parker *v.* Whitby, T. & R. 371.

[2] Moore *v.* Aylett, Dick. 643; Gascoygne's case, 14 Ves. 183; Turner *v.* Burleigh, 17 Ves. 354.

[3] Bates, *ex parte*, Gresley, Eq. Evid. 494.

[4] Bishop *v.* Church, 2 Ves. 100, 106; Lord, *ex parte*, Id. 26; Bank *v.* Farques, Ambl. 145. And see 4 Ves. 762, per Ld. Alvanley, M. R.; Barnes *v.* Stuart, 1 Y. & C. 139, per Alderson, B.; Margareson *v.* Saxton, Id. 532.

[5] Stewart *v.* Turner, 3 Edw. Ch. R. 458; Fenwicke *v.* Gibbes, 2 Dessaus. 629; Smith *v.* Webster, 3 My. & C. 304. Hence also, a witness before the master is protected from arrest, *eundo, morando, et redeundo*. Sidgier *v.* Birch, 9 Ves. 69.

[6] Adams, Doctr. of Eq. p. [379], 672. ["The reference *for the protection of absent parties* is made where the claim, or the possibility of a claim, to the property in suit, belongs to creditors or the next of

But a reference is never made to establish, in the first instance, a fact put in issue by the pleadings, and constituting an essential element in the controversy.[1]

§ 333. The *authority of the master*, which, by the former practice, was generally stated in every order of reference, is now given, in the Courts of the United States, by a general rule for that purpose.[2] This rule directs that the master shall regulate all the proceedings, in every hearing before him, upon every such reference; that he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference;[3] and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto;[4] and also to examine

kin, or other persons entitled as a class, so that at the hearing it is uncertain whether they are all before the Court. In order to remove this uncertainty, a reference is made to the master to ascertain the fact before any step is taken for ascertaining or distributing the fund. And, on the same principle, if a proposal of compromise or of arrangement by consent is made where any of the parties are infants or *femes covert*, and therefore unable to exercise a discretion, the Court, before sanctioning the proposal, will ascertain by reference whether it is for their benefit. Fisk *v.* Norton, 2 Hare, 381.

"A reference *for the working out of details* is principally made in matters of account, when the Court declares that the account must be taken, and refers it to the master to investigate the items. Hart *v.* Ten Eyck, 2 Johns. Ch. 518; Consequa *v.* Fanning, 3 Ib. 591; Barron *v.* Rhinelander, Ib. 614; Maury *v.* Lewis, 10 Yerg. 115. The same principle applies to the investigation of the vendor's title; for the Court cannot undertake to peruse the abstract, but will devolve that duty on the master. In like manner it will be referred to a master to ascertain damages in a bill for specific performance, when the defendant has put it out of his power to convey, Woodcock *v.* Bennet, 1 Cowen, 711; — to settle conveyances; to superintend sales; to appoint trustees, receivers, guardians, &c.; to judge of the impertinency or insufficiency in pleadings and the like.

"A reference *to supply failures or defects in the evidence* is made when the evidence already given has induced a belief in the Court that new matter might be elicited by inquiry, or where allegations have been made in the answer, though not established by proof, which, if true, would be material in the cause." Adam's Doctrine of Eq. 379 – 382. Wharton's notes.]

[1] Lunsford *v.* Bostion, 1 Dev. Eq. R. 483; Holden *v.* Hearn, 3 My. & K. 445.

[2] Rules for Circuit Courts in Equity, Reg. 77.

[3] In accounting before the master, the oath of the party is not to be admitted as evidence to support items in an account, which, from their character, admits of full proof by vouchers, or other legal evidence. Harding *v.* Handy, 11 Wheat. 103, 127. As to the master's power to examine parties, see Seaton on Decrees, 11; 2 Dan. Ch. Pr. 1360, 1366 [* 3d Amer. Ed. 1153]; Hollister *v.* Barkley, 11 N. H. 501. Parties may be examined *toties quoties*, at the discretion of the master; but witnesses may not, without an order. Cowslade *v.* Cornish, 2 Ves. 270; Hart *v.* Ten Eyck, 2 Johns. Ch. 513. But a *vivâ voce* examination of the party does not alter his rights; and therefore he cannot be cross-examined by his own counsel; but his answers, when responsive, are testimony, and he may accompany an answer by any explanation, fairly responsive to the interrogatory. Benson *v.* Le Roy, 1 Paige, 122. Regularly, a special order is necessary to empower the master to examine the parties; but if this is omitted in the order of reference, and the master nevertheless examines a party on oath, without objection at the time, this is no ground of exception to the report. Copeland *v.* Crane, 9 Pick. 73. Before the master, co-defendants may examine each other; Simmons *v.* Gutteridge, 13 Ves 262; but it seems that co-plaintiffs may not. Edwards *v.* Goodwin, 10 Sim. 123. An examination, like an answer, is evidence against none but the party examined. 2 Dan. Ch. Pr. 1378 [* 3d Amer. Ed. 1174]; 2 Smith, Ch. Pr. 135.

[4] See Eng. Orders of 1828, Ord. 60, 72.

on oath, *vivâ voce*, *all* witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office,[1] or by deposition according to the acts of Congress, or otherwise, as hereafter mentioned; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally, to do all other acts, and direct all other inquiries and proceedings, in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and to the rights of the parties. This summary of his powers, in a general rule made under the authority of an act of Congress, renders any special enumeration of powers in an order of reference wholly superfluous. And the course of proceeding here indicated, as well as the authority given to the master, is believed to be in accordance with the general course of practice in the State tribunals.

§ 334. *Witnesses*, who live within the District, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or *before a master* or examiner appointed in any cause, by *subpœna*, issued in the usual form by the clerk of the Court; and if a witness disobeys the *subpœna*, or refuses to give evidence, it will be deemed a contempt of the Court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue by order of the Court or of any Judge thereof, in the same manner as if the contempt were by refusing to appear or to testify in the Court.[2]

§ 335. In *taking accounts*, any party, not satisfied with the account brought in against him, may *examine the accounting party vivâ voce*, or upon interrogatories in the master's office, or by deposition, as the master may direct.[3] All *affidavits*, *depositions*, and *documents*, which have been previously *made*, *read*, or *used* in Court upon any proceeding in the cause, *may be used before the*

[1] See Eng. Orders of 1828, Ord. 69; Banford *v.* Banford, 2 Hare, 642; Adams, Doctr. of Equity [382], 678. It has been doubted, whether, under the English Order just referred to, which is substantially the same with the clause in the text, the master could, without an order, examine any witness *vivâ voce*, who had previously been examined in the cause; but in one case the Master of the Rolls seems clearly to have recognized the rule, that an order was necessary for a re-examination before the master, as well as for a re-examination before the hearing. 2 Dan. Ch. Pr. 1394 [* 3 Amer. Ed. 1192]; Rowley *v.* Adams, 1 My. & K. 543.

[2] Rules for Circuit Courts in Equity, Reg. 78.

[3] Idem, Reg. 79. And see Eng. Orders of 1828, Ord. 61.

*master;*[1] and he may examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *vivâ voce*, or in both modes, as the nature of the case may seem to require; the testimony, thus given, being taken down in writing by the master, or some other person by his order, and in his presence, if either party requires it, in order that it may be used in Court, if necessary.[2]

[1] Idem, Reg. 80. And see Eng. Orders of 1828, Ord. 65; 2 Dan. Ch. Pr. 1379 [* 3d Amer. Ed. 1175, 1176]; Smith *v.* Althus, 11 Ves. 564. But the answer of one defendant cannot be used before the master, as an affidavit, against another defendant. Hoare *v.* Johnstone, 6 Keen, 553. Nor can *ex parte* affidavits ordinarily be used before him. Cumming *v.* Waggoner, 7 Paige, 603.

[2] Idem, Reg. 81. And see Eng. Orders of 1828, Ord. 72; 2 Dan. Ch. Pr. 1379 [* 3d Amer. Ed. 1175]. The subject of examinations before a master was fully considered by the learned Chancellor Kent, in Remsen *v.* Remsen, 2 Johns. Ch. 495, 500–502, where the result of his investigation is stated in these words: "The general rules which are to be deduced from the books, or which ought to prevail on the subject of examinations before the master, and which appear to me to be best calculated to unite convenience and despatch with sound principle and safety, are,

"1. That the parties should make their proofs as full, before publication, as the nature of the case requires or admits of, to the end that the supplementary proofs, before the master, may be as limited as the rights and responsibilities of the parties will admit.

"2. That orders of reference should specify the principles on which the accounts are to be taken, or the inquiry proceed, as far as the Court shall have decided thereon; and that the examinations before the master should be limited to such matters, within the limits of the order, as the principles of the decree or order may render necessary.

"3. That no witness in chief, examined before publication, nor the parties, ought to be examined before the master, without an order for that purpose, which order usually specifies the subject and extent of the examination; and a similar order seems to be requisite when a witness, once examined, is sought to be again examined before the master, on the same matter. But it is understood to be the settled course of the Court, 1 Vern. 283, *anon.*; 1 Vern. 470, Witcherly *v.* Witcherly; 2 Ch. Cas. 249, Everard *v.* Warren; Mosely, 252, Morely *v.* Bonge; Robinson *v.* Cumming, 2 Atk. 409, and 2 Fonb. 452, 460–462 (see also O'Neil *v.* Hamill, 1 Hogan, 183), that upon the defendant accounting before the master, he is to be allowed, on his own oath, being credible and uncontradicted, sums not exceeding forty shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only; and the whole of the *items*, so established, must not exceed £100, and the defendant cannot, by way of charge, charge another person in this way. The *forty* shillings sterling was the sum established in the early history of the Court, and, perhaps, twenty dollars would not now be deemed an unreasonable substitute.

"4. That the master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or *items* are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed *items* claimed by either party ought to be reduced to writing by the parties, respectively, by way of charges and discharges, and the requisite proofs ought then to be taken on written interrogatories, prepared by the parties, and approved by the master, or by *vivâ voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct, in the given case. That the testimony may be taken in the presence of the parties, or their counsel (except when by a special order of the Court it is to be taken secretly); and it ought to be reduced to writing, in cases where the master shall deem it advisable, by him, or under his direction, as well where a party as where a witness is examined.

"5. That in all cases where the master is directed by the order to report the proofs, the depositions of the witnesses should be reduced to writing by the master, and subscribed by the witnesses, and the depositions returned with his report to the Court.

"6. That when an examination is once begun before a master, he ought, on assigning a reasonable time to the parties,

§ 336. In the examination of witnesses before the master, it is not competent for him to examine as witnesses any persons *who have previously been examined in the cause*, without leave of the Court. This rule is founded on the same reason which precludes the re-examination of a witness before the hearing, namely, the danger of perjury, which might be incurred from allowing a witness to depose a second time to the same facts, after the party adducing him has discovered the weak parts of the proof in his cause. And for the same reason, when leave is granted for the re-examination of a witness before the master, it is generally granted on the terms of having the interrogatories settled by the master; who, in so doing, will take care that the witness is not re-examined to the same facts.[1] But where the reason of the rule fails, the rule is not applied; as, for example, where the first examination has accidentally failed, by reason of the witness having then been incompetent from interest, which has since been removed.[2] So where a witness, previously examined, has made affidavit in support of a state of facts before the master, he may be examined *vivâ voce* before the master, to the matter of his affidavit.[3] So, where the previous examination was confined to the proof of exhibits at the hearing, he may be examined before the master, in proof of other exhibits.[4] But if a witness, who has been once examined to the matters in issue, is re-examined before the master, without a special order, though the re-examination be to matters not before testified to by him, it is an irregularity, and has been deemed a sufficient cause for suppressing the second deposition.[5]

to proceed, with as little delay and intermission as the nature of the case will admit of, to the conclusion of the examination, and when once concluded, it ought not to be opened for further proof, without special and very satisfactory cause shown.

"7. That after the examination is concluded, in cases of reference to take accounts, or make inquiries, the parties, their solicitors, or counsel, after being provided by the master with a copy of his report (and for which the rule of the 1st of November last makes provision), ought to have a day assigned them to attend before the master, to the settling of his report, and to make objections, in writing, if any they have; and when the report is finally settled and signed, the parties ought to be confined, in their exceptions to be taken in Court, to such objections as were overruled or disallowed by the master." This outline of practice is believed to be pursued in all the States, where it is not otherwise regulated by special rules.

[1] 2 Dan. Ch Pr. 1383, 1384 [* 3d Amer. Ed. 1180]; Vaughan *v.* Lloyd, 1 Cox, 312; Whitaker *v.* Wright, 2 Hare, 321; Sawyer *v.* Bowyer, 1 Bro. Ch. C. 388, and cases cited in Perkins's note; Jenkins *v.* Eldredge, 3 Story, R. 299, 308, 309; Gass *v.* Stinson, 2 Sumner, 605.

[2] Sanford *v.* ———, 1 Ves. 398; 3 Bro. Ch. C. 370, S. C.; Callow *v.* Mince, 2 Vern. 472.

[3] 2 Dan. Ch. Pr. 1385; Rowley *v.* Adams, 1 My. & K. 543.

[4] Ibid.; Courtenay *v.* Hoskins, 2 Russ. 253.

[5] Smith *v.* Graham, 2 Swanst. 264. But the suppression was made without prejudice to any application for the re-examination of the witness. And see Greenaway *v.* Adams, 13 Ves. 360; Vaughan *v.* Lloyd, 1 Cox, Ch. C. 312. See also Jenkins *v.*

To the case of witnesses who have not already been examined, this rule requiring a special order is now generally understood not to apply; for it is said that, where a case is sent to a master, for inquiry into a fact, it is in the nature of a new issue joined; and what would be evidence in any other case upon that issue, is evidence before the master; the evidence already in the cause, upon the same matter, is admissible before him, and other witnesses, to the matter referred, may also be examined, as of course.[1] But the rule does apply to the re-examination of witnesses who have once been examined before the master to the same facts, it being held irregular, except upon a special order.[2]

§ 337. A *third mode* in which the Court obtains further information for itself is, by sending a *feigned issue* to a Court of Law, for *trial by a Jury*. It will be recollected, as we have already seen, that, according to the doctrine of Equity, the facts are finally found by the Chancellor, and that, of course, all the subordinate means of ascertaining them, and verdicts, among the rest, are used only for his information, and not imperatively to govern and control his judgment. Hence it is, that it is competent and usual for him to order the terms on which the trial shall proceed, and what evidence the parties shall respectively admit or adduce.[3] Thus, in directing an issue, the Court will, in its discretion, order the parties to make such admissions as it thinks are *necessary to raise the question* to be determined; that they produce at the trial

Eldredge, 3 Story, R. 299, 308, 309, where the general rule was reviewed and acted upon by Story, J. But where the examination before the master was confined to points collateral to the matters in issue at the hearing, it has recently been held that an order was not a necessary prerequisite. 1 Hoffm. Ch. Pr. 538; Swinford *v.* Horne, 5 Madd. 379. And such, it seems, had been the practice for more than a century, as appears from Medley *v.* Pearce, West, R. 128, per Ld. Hardwicke.

[1] Smith *v.* Althus, 11 Ves. 564; Hough *v.* Williams, 3 Bro. Ch. C. 190; Gass *v.* Stinson, 2 Sumn. 605, 612. But see Wilan *v.* Wilan, 1 Cooper, Ch. C. 291; Hoffman's Master in Chancery, 45, 46.

[2] Remsen *v.* Remsen, 2 Johns. Ch. 500; Cowslade *v.* Cornish, 2 Vez. 270.

[3] Whether, in such case, the parties ought to be deprived of the use of any legal evidence, *quære*; and see Beachinall *v.* Beachinall, 1 Vern. 246. In this case Lord Nottingham, in directing a trial at law, ordered that a certain deed should not be given in evidence; and for this cause, on review, the Lord Keeper reversed the decree. In Apthorp *v.* Comstock, 2 Paige, 482, where the genuineness of a deed was in question, the Chancellor, in directing an issue, ordered that the proof of the execution of the deed, taken before the commissioner, prior to its registration, and which entitled it to be read at law, should not be received at the trial as any evidence of the execution of the deed, or of the genuineness of any of the signatures upon it; to which order no exception was taken. And in Elderton *v.* Lack, 2 Phil. R. 680, it was held that, where the plaintiff's title to relief in Equity depended on a legal right, the Court ought not to interfere with the trial of that right in a Court of Law, by requiring the defendant to admit any fact upon which that right depended. And see Smith *v.* E. of Effingham, 10 Beav. 589; [United States *v.* Samperyac, 1 Hemp. 118; Ward *v.* Hill, 4 Gray, 593; Waterman *v.* Dutton, 5 Wis. 413.]

any books, papers, and documents in their possession, power, or control, which it may deem useful for a full investigation of the matter in issue, and which, as we have heretofore seen, it may order in the principal cause;[1] and that witnesses who have deposed in the cause may be examined *vivâ voce*, or their depositions read at the trial; that new witnesses shall not be adduced, without sufficient previous notice of their names, residences, and additions, to enable the other party to ascertain their character. The Court will, also, in its discretion, designate which party shall hold the affirmative of the issue; will order that the trial be by a struck Jury, if either party desire it, and the justice of the case so requires; and will impose such restrictions upon the parties as will prevent all fraud or surprise on the trial.[2]

§ 338. Whether the Court, in directing an issue, has a right to *order the parties themselves to be examined*, without their consent, is a question upon which there appears to have been some conflict of opinion. It is agreed that this may be done where the parties are merely nominal or fiduciary. Where the facts in dispute rest only in the knowledge of the parties, or where oath is so balanced by oath that it is proper for a Jury to weigh their credit, — as, for example, where an injunction is asked for upon the affidavit of one party, and opposed upon that of another, and an issue is in consequence directed, — it is also considered proper that both the parties themselves should be examined. In such cases they are not considered as witnesses for themselves, or for each other, but as witnesses for the Court, to satisfy its own conscience.[3] In other cases such examinations have been refused, unless by mutual consent and subject to the discretion of the Court;[4] and even then it has been observed, that the practice of allowing parties to be examined for themselves is to be resorted to

[1] See *supra*, §§ 295 – 307.

[2] 2 Dan. Ch. Pr. 1296, 1297. [* 3d Amer. Ed. 1097]. See Apthorp *v.* Comstock, 2 Paige, 482, 485, for a precedent of the exercise of this power of directing the course of the trial, mentioned in the text. [The feigned issue may also be amended in a proper case and upon proper application. Waterman *v.* Dutton, 5 Wis. 413.] [* Where issues are awarded in a suit in Equity, after proofs are taken, the Court may, in its discretion, direct that, in the trial of those issues, the depositions already taken may be read, unless the attendance of the witnesses is actually procured, and also that such further evidence may be adduced, including the testimony of the parties, as by law would be competent on the trial of such issues. Clark *v.* Society, 44 N. H. Rep. 382.]

[3] De Tastet *v.* Bordenave, 1 Jac. R. 516; Dister, *ex parte*, Buck's Cas. 234. And see Hepworth *v.* Heslop, 6 Hare, 622; 13 Jur. 384; 2 Dan. Ch. Pr. 1298; 1 Hoffm. Ch. Pr. 505, 506; Fletcher *v.* Glegg, 1 Young, 345.

[4] Howard *v.* Braithwaite, 1 V. & B. 374; Gardiner *v.* Rowe, 4 Madd. 236; Hepworth *v.* Heslop, *supra*.

with great caution, and never, unless under the peculiar circumstances of the case, justice could not be attained without it; and certainly never, when, from the position of the parties, an unfair advantage would be given by it to one over the other. Thus, where the fact in issue appeared to have occurred in the presence of only the plaintiff and a late partner of the defendants, who was since dead, an examination of both parties was held improper, as calculated to give the plaintiff an undue advantage.[1] The order for the examination of a party does not affect the character or weight of his evidence; it only removes the objection which arises from his being a party in the cause.[2]

§ 339. According to the course of the Court of Chancery, the trial of an issue directed to a Court of Law is generally conducted in the same manner, and by the same rules, as are observed in other trials at law, unless the Court of Chancery, in ordering the issue, has given different directions. In those States, however, in which a trial by Jury, in cases in Equity, may be claimed *as of right*, it is conceived that, in the absence of any statute expressly, or by clear implication, empowering the Court to impose terms on the parties, or to interfere with their legal rights in regard to the course of proceeding in the trial, no such power could lawfully be exercised.[3] But where no such right of the parties exists, this power of the Court remains, as long recognized in Chancery proceedings in England, with the modifications which have been adopted here, in our State tribunals, or created by statutes. But where the devisee in a will seeks to establish it against the heir, the invariable course of Chancery requires that the due execution of the will should be proved by the examination of all the attesting witnesses who are in existence and capable of being examined; and that the same course be pursued upon the trial of an issue of *devisavit vel non;* except in the cases where, by the rules of evidence, in Courts of Law, their production may be dispensed

[1] Parker *v.* Morrell, 2 Phil. 453; 12 Jur. 253.

[2] Rogerson *v.* Whittington, 1 Swanst. 39.

[3] [* Franklin *v.* Greene, 2 Allen, 522.] In Marston *v.* Bracket, 9 N. Hamp. 336, 345, the right exercised by the Court seems clearly to have been derived from the statute. The practice on this point, in the different States, is various and unsettled. But where the right of the party to a trial by Jury is absolute, and uncontrolled by any constitutional or statutory limitation, it is conceived that the power of the Court, as a Court of Chancery, to modify the exercise of the right, is taken away. It is only where the trial depends on the pleasure of the Court that the course of proceeding can be thus modified. Cujus est *dare, ejus* est disponere. [In Ward *v.* Hill, 4 Gray, 593, the ordering of an issue to a Jury in a suit in Equity, upon the application of the complainant, was held to be within the discretion of the Court, and not open to exception.]

with. For as a decree in support of the will is conclusive upon the heir, against whom an injunction would be granted, if he should disturb the possession after the decree, it is held to be reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him.[1]

### 7. EVIDENCE ALLOWED ON SPECIAL ORDER.

§ 340. Another mode in which a Court of Chancery, in the exercise of its discretion, and to do complete justice and equity upon the merits, will administer the law of evidence by more flexible rules than are recognized in the Common Law, is apparent in the allowance of evidence upon special order; which is done, either by admitting some kinds of evidence which it would be *inconvenient* and *unreasonably expensive* to produce in the regular way; or by permitting the parties to supply *defects and omissions of proof* and to give *explanatory evidence*, at later stages in the cause than the ordinary rules will allow. One instance, of the former class, is in the admission of *viva voce* testimony in the *proof of exhibits* at the hearing, instead of requiring proof by depositions, in the ordinary course; a subject which we have already considered, in another connection.[2] Another case of the same class, was where the vouchers in support of an account were impounded in the Ecclesiastical Court, which does not give up anything once impounded; and the expense of having the officer to attend the master would be considerable; in which case the Lord Chancellor directed the master to allow items upon vouchers, which it should be verified by affidavit were so impounded.[3] On the same principle, an account, kept forty-nine years ago, by a person since deceased, was ordered to be received by the master as *prima facie* evidence of the particular items in the account to be taken by him pursuant to the prayer of the bill; throwing on the other side the burden of impeaching them.[4]

§ 341. Upon special order, the Court will permit the parties to read at the hearing any *answers*, *depositions*, or *other proceedings*, *taken in another cause*, and this without requiring a foundation first to be laid, by proving the bill and answer in the cause in which the depositions or other subsequent proceedings were taken.

[1] See *ante*, Vol. 2, § 694, and the cases there cited. See also McGregor *v.* Topham, 3 H. L. Cas. 132.

[2] *Supra*, §§ 308–310, 319.

[3] Neilson *v.* Cordell, 8 Ves. 146.

[4] Chalmer *v.* Bradley, 1 Jac. & Walk. 65

Complete mutuality or identity of all the parties has been shown, in a previous volume, not to be necessary; it being sufficient if the point or matter in issue were the same in both cases, and the party against whom the evidence is offered, or those under whom he claims, had full power to cross-examine the witnesses.[1] Nor is it necessary to this end that the parties to the present suit, or those whom they represent, should have sustained the relations of plaintiff and defendant in the former suit; it is sufficient that they were parties to the suit, though on the same side. The reason for this was given by Lord Hardwicke, who observed that it frequently happens that there are several defendants, all claiming against the plaintiff, and also having different rights and claims among themselves; and the Court then makes a decree, settling the rights of all the parties; but that a declaration for that purpose could not be made, if the decree and proceedings could not afterwards be admitted in evidence between the defendants; and the objection, if allowed, would occasion the splitting of one cause into several.[2]

§ 342. In regard to *depositions taken in a cross-cause*, it is requisite that the witnesses be examined before publication in the original cause has passed, otherwise the depositions are liable to be suppressed.[3] But if the point in issue in both cases is the same, and the depositions in the cross-cause were taken before either party had examined witnesses in the original cause, they may be read in the latter cause.[4] And depositions taken in the cross-cause, to matters not put in issue by the original cause, may be read, notwithstanding they were taken after publication had passed in the original cause.[5] On the same principle, where depositions, taken in an original cause, are admitted to be read in a cross-cause, such parts only are admissible as were pertinent to the issue in the original cause.[6]

[1] *Ante*, Vol. 1, §§ 522, 523, 536, 553. And see Eade *v.* Lingood, 1 Atk. 204; Coke *v.* Fountain, 1 Vern. 413; Nevil *v.* Johnson, 2 Vern. 447; Mackworth *v.* Penrose, 1 Dick. 50; Humphreys *v.* Pensam, 1 My. & C. 580; Roberts *v.* Anderson, 3 Johns. Ch. 371, 376; Dale *v.* Rosevelt, 1 Paige, 35; Payne *v.* Coles, 1 Munf. 373; Harrington *v.* Harrington, 2 How. 701; Att'y-General *v.* Davison, McCl. & R. 160. Where suits between several parties, who are not the same in each suit, are consolidated and tried at once, by mutual agreement, it seems that depositions taken in one of the suits may be admitted on the trial, against any of the parties, though they were not original parties to the particular suit in which the deposition was taken. Smith *v.* Lane, 12 S. & R. 80.

[2] Askew *v.* The Poulterer's Co., 2 Vez. 89. But in such case the evidence is not conclusive. Ibid. And see Chamley *v.* Lord Dunsany, 2 Sch. & Lefr. 690, 710; 2 Dan. Ch. Pr. 1013.

[3] Pascall *v.* Scott, 12 Sim. 550.

[4] Wilford *v.* Beasely, 3 Atk. 501; 2 Dan. Ch. Pr. 1011; Christian *v.* Wrenn, Bunb. 321.

[5] Ibid.

[6] Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339.

§ 343. In the exercise of the same liberal discretion, evidence taken in the *Exchequer* has been allowed to be read between the same parties, litigant in Chancery.[1] So, of an examination in the *Admiralty Court*.[2] And depositions taken by the defendant in a suit which was afterwards dismissed by the complainant, may be read in a subsequent suit between the same parties, for the same cause, where the same witnesses cannot again be had.[3] So, if a deposition taken *de bene esse*, is read at the hearing when it might have been effectually objected to for irregularity, and an issue is afterwards directed, it is of course to order it to be read at the trial notwithstanding the irregularity.[4]

§ 344. The *evidence of parties* and of *interested witnesses* also, will sometimes be allowed on special order in Equity where it is found essential in order *to detect and reach a fraudulent transaction*, or *to discover the true and real intention of a trust or use*, declared in a deed. Thus, upon an allegation that the defendant's title to the estate in question was *fraudulent*, the plaintiff was permitted to read the deposition of Mrs. Haughton, the defendant's grantor, to impeach her title to the estate, and to show that it was only a pretended title, done with no other view than to assist the defendant in carrying on a fraud.[5] So, a *trustee*, having the legal interest in the estate, but being merely nominal in every other respect, may be examined as a witness in Equity, as to the merits or intention of the trust title ; though it is otherwise at Law.[6] So, in the case of a fraudulent abstracting of the plaintiff's money or goods by the defendant, a Court of Equity will admit the plaintiff's own oath as to the extent or amount of his loss, *in odium spoliatoris ;* while at Law, this rule, though in several cases it has been freely admitted, as a rule of necessity, yet has sometimes been questioned.[7] In directing an *account*, also, the Court will sometimes direct it to be taken with the admission of certain documents or testimonies, not having the character of legal evidence. In cases of this sort, a distinction is made, upon the following principle laid down by Lord Eldon. If parties have been permitted, for a

[1] Magrath *v.* Veitch, 1 Hog. 127. And see Williams *v.* Broadhead, 1 Sim. 151.

[2] Watkins *v.* Fursland, Toth. 192.

[3] Hopkins *v.* Strump, 2 H. & J. 301.

[4] Gordon *v.* Gordon, 1 Swanst. 166. The death of the witnesses, or their absence beyond the reach of process, seems to be requisite in such cases. 1 Swanst. 171, n. ; Fry *v.* Wood, 1 Atk. 445 ; Coker *v.* Farwell, 2 P. Wms. 563 ; Carrington *v.* Carnock, 2 Sim. 567.

[5] Man *v.* Ward, 2 Atk. 228.

[6] 2 Atk. 229, per Lord Hardwicke.

[7] Childrens *v.* Saxby, 1 Vern. 207. See *ante*, Vol. 1, § 348, and cases there cited.

long course of years, to deal with property as their own; considering themselves under no obligation to keep accounts as though there was any adverse interest, and having no reason to believe that the property belongs to another; though it would not follow that, being unable to give an accurate account, they should keep the property; yet the account, in such cases, would be directed, not according to the strict course, but in such a manner as, under all the circumstances, would be fit. But, where both parties knew that the property was the subject of adverse claim, and those who desired to have the rules of evidence relaxed had undertaken that there should be no occasion for deviating from the strict rule, but that there should be clear accounts, and that the other party should have his property without hazard of loss from the want or the complication of accounts, the case is then widely different; and a previous direction to the master to receive testimony not having the character of legal evidence, would introduce a most dangerous principle.[1]

§ 345. A more frequent occasion for a special order for the admission of evidence out of course, arises when such evidence is necessary to supply *defects or omissions* in the proofs already taken, and *discovered before the final hearing*. These are either discovered and become material in consequence of something unexpectedly occurring in the course of the proceedings;[2] or they happened by accident, or from inadvertence. In the former case, relief is usually given by leave to file a supplemental bill, or a bill of review, or a supplemental answer, and to adduce evidence in its support. But the course of the Court, as we have already had occasion to observe, requires that, as far as practicable, the examination of every witness should be taken at one sitting, and without interruption; and that after the witness has signed his deposition, and "turned his back upon the examiner," no opportunity should be given for tampering with him, and inducing him to retract, contradict, or explain away, in a second examination, what he has already stated in the first. This rule, however, is not universally

[1] Lupton *v.* White, 15 Ves. 443.

[2] Where an old paper-writing, material in the cause, was discovered after publication, and was not provable, *viva voce*, as an exhibit, leave was granted to prove it upon interrogatories and a commission. Clarke *v.* Jennings, 1 Anstr. 173. So, where two witnesses were relied upon to prove handwriting, but, on examination, both declared their disbelief of it, the party was permitted to examine other witnesses to that point, since the previous examination furnished no reason why this should not be done. Greenwood *v.* Parsons, 2 Sim. 299.

imperative; for it seems that leave to re-examine a witness, even *before* publication, will be granted, whenever the grounds of the motion for that purpose are such as would support an application for a bill of review; or, more generally speaking, that an exception to the rule will be admitted, whenever the special circumstances render it necessary, for the purposes of justice, to make one.[1] But generally, a special order for the re-examination of a witness, for the purpose of supplying a defect in his former examination, will not be made until publication has passed in the cause; for the propriety of granting the application cannot readily be seen, without inspecting the depositions already taken.[2] Yet in special cases, where a clear mistake was capable of specific correction by reference to documents and other writings, this has been permitted, before publication; the re-examination being restricted to that alone.[3] The order for the re-examination of a witness is always founded upon one or the other of the grounds before mentioned, namely, accident or surprise; and the rule is the same, whether he is to be re-examined before the hearing, or upon a reference to the master, the reasons in both cases being the same.[4]

§ 346. Where *depositions have been suppressed* on account of some accidental irregularity, either in the conduct of the cause, or in the examination of the witnesses, the Court, in its discretion, will permit a re-examination of the witnesses, upon the original interrogatories, if they were proper, or upon fresh ones, if they were not.[5] So, *where the witness has made a mistake* in his testimony,[6] or has omitted to answer some parts of the interrogatories,[7] or, *the examiner has omitted* to take down or has erroneously taken down some part of his answer;[8] and in other like cases, where the defect of evidence has resulted from *accident* or *inadvertence;*

[1] 2 Dan. Ch. Pr. 1150 [*3d Amer. Ed. 970]; Cockerill *v.* Cholmeley, 3 Sim. 313, 315; Rowley *v.* Adams, 1 My. & B. 543, 545, per Sir J. Leach, M. R. And see Hallock *v.* Smith, 4 Johns. Ch. 650; Beach *v.* Fulton Bank, 3 Wend. 573, 580; Harmersly *v.* Lambert, 2 Johns. Ch. 432; Gray *v.* Murray, 4 Johns. Ch. 412.

[2] 2 Dan. Ch. Pr. 1153 [*3d Amer. Ed. 972]. See also Ld. Abergavenny *v.* Powell, 1 Meriv. 130, 131, per Ld. Eldon; Stanney *v.* Walmsley, 1 My. & C. 361, per Ld. Cottenham.

[3] Kirk *v.* Kirk, 13 Ves. 280; Id. 285, S. C., per Ld. Erskine.

[4] *Supra*, § 336

[5] 2 Dan. Ch. Pr. 1147, 1148, 1150 [*3d Amer. Ed 970]; Wood *v.* Mann, 2 Sumn. 316, 323. And see Curre *v.* Bowyer, 3 Swanst. 357; Healey *v.* Jagger, 3 Sim. 494.

[6] Bryne *v.* Frere, 1 Moll. 396; Turner *v.* Trelawney, 9 Sim. 453.

[7] Potts *v.* Curtis, 1 Younge, 343.

[8] Bridge *v.* Bridge, 6 Sim. 352; Kingston Trustees *v.* Tappen, 1 Johns. Ch. 368. If the omission was through 'the culpable negligence or inattention of the party or his counsel, a re-examination will be refused. Healey *v.* Jagger, *supra;* Asbee *v.* Shipley, 5 Madd. 467; Ingram *v.* Mitchell, 5 Ves. 299.

leave to supply the defect and correct the error, by a re-examination of the witness, will be granted; the re-examination being restricted to the supply of the defect, or the correction of the error, without retaking any other parts of the testimony, unless the entire original deposition has been suppressed.[1] The ordinary method of showing to the Court the fact and circumstances of the

[1] See Hood *v.* Pimm, 4 Sim. 101. "There is," said the Vice-Chancellor of England, "an abundance of cases to show that, uniformly, from the earliest times, Courts of Equity have relieved against mere errors of examiners, commissioners, witnesses, solicitors, and counsel, and, when there has been an accidental defect in evidence, have, before the hearing, at the hearing, and at the rehearing of a cause, allowed the defect to be supplied. In Bloxton *v.* Drewit (Prec. in Chan. 64), an order was made to prove a deed *vivâ voce*. It turned out that the attesting witnesses were dead, and leave was given, at the hearing, to prove the deed. In Spence *v.* Allen (Ibid. 493), after depositions had been suppressed, because they were leading, which was the error of counsel, leave was given to file new interrogatories; and a similar leave was given in the case of Lord Arundel *v.* Pitt (Amb. 585). In the case of Griells *v.* Gansell (2 P. Wms. 646), a deposition has been taken erroneously, by the examiner, or through mistake of the witness, and leave was given to correct the mistake. And in two instances, in the case of Kirk *v.* Kirk (13 Ves. 280–285), where witnesses had made mistakes, the mistake was corrected, in one instance, on the application of the defendant; in the other, on the application of the witness. In Shaw *v.* Lindsey (15 Ves. 380), and in Ferry *v.* Fisher (Ibid. 382), there cited, the Court relieved against the error of commissioners in taking depositions; and, though it suppressed the erroneous depositions, directed the witnesses to be examined over again. In Lord Cholmondeley *v.* Lord Clinton (2 Mer. 81), where the intention was to examine witnesses properly, and, by mistake of the solicitor, an error happened, the Court relieved; and Lord Eldon said he was clear the Court had an undoubted right to rectify a mere slip in its proceedings. Lord Eldon indeed says, in Willan *v.* Willan (19 Ves. 590), 'after publication, previous to a decree, you cannot examine witnesses further, without great difficulty, and the examination is generally confined to some particular facts.' But this shows Lord Eldon's opinion that leave might be given in a proper case. In Wallace *v.* Hodgson (2 Atk. 56; 1 Russ. 526, note), Lord Hardwicke, after he had gone through the hearing of a cause, postponed it, and gave leave to exhibit interrogatories to prove the sanity of the testator. It appears, from the report (2 Atk. 56), that he thought it a mere matter of form. In Bank *v.* Farquharson (Amb. 145; S. C. 1 Dick. 167), Lord Hardwicke, before the hearing of a cause, adjourned it, in order that a deed might be proved, which could not be proved merely as an exhibit. In Sandford *v.* Paul (3 Bro. 370), Lord Thurlow, on motion before the hearing, where a mistake had happened, allowed a witness, who had been examined, to be re-examined. In the Attorney-General *v.* Thurnall (2 Cox, 2), on motion at the hearing, leave was given to enter into further evidence, so as to let in the copy of a will. In Walker *v.* Symonds (1 Mer. 37, n.), leave was given, on a rehearing, to read exhibits not proved at the hearing. In Cox *v.* Allingham (Jac. 337), upon petition, after the hearing, leave was given to enter into new evidence as to the loss of a deed, so as to let in evidence of a copy. In Moons *v.* DeBernales (1 Russ. 307), and Abrams *v.* Winshup (1 Russ. 526), upon application in the course of the hearing, leave was given to enter into further evidence as to the death of a person, and the sanity of a testator; and in Williams *v.* Goodchild (2 Russ. 91), Lord Eldon expressed an opinion that, on a rehearing upon special application, new evidence might be received. In Williamson *v.* Hutton (9 Price, 187), the Court of Exchequer permitted a rehearing on the ground of new evidence discovered since the hearing, and gave leave, not merely to prove exhibits *vivâ voce*, but to exhibit interrogatories to prove them. In Coley *v.* Coley (2 You. & Jerv. 44), the Chief Baron, when the cause was set down for hearing, gave leave, on motion, to examine two further witnesses to a will, when one only had been examined; and though in Wyld *v.* Ward (2 You. & Jerv. 381), he would not allow proof of the lease at the rehearing, unless it could be proved as an exhibit, his reason seems to have been, that he thought the omission to prove it at the hearing arose from mere neglect; not accident, but blamable neglect." 4 Sim. 110–113.

mistake is by the affidavit of the witness; but this may also appear from the certificate of the commissioner or magistrate, or upon the face of the deposition, or otherwise; for the Court, when once it has knowledge of the fact, will act upon it, in whatsoever manner that knowledge may have been obtained.[1]

§ 347. Sometimes, in cases of a clear mistake, involving only a verbal alteration, the Court, instead of ordering a re-examination of the witness, *will permit the deposition to be amended in open Court*. This has been done by the alteration of a date, stated by the witness by mistake;[2] by the correction of a mistake of the examiner;[3] especially where the witness was aged and very deaf;[4] where the name of the party defendant was mistaken in the interrogatories;[5] and in other like cases; the mistake being first clearly shown and proved to the entire satisfaction of the Court.[6]

§ 348. Another case, in which evidence will be allowed to be taken out of the ordinary course, and upon special order, is, *to impeach the credit of witnesses* who have already been examined. To obtain an order for this purpose, it is necessary that "articles" first be filed, charging the bad character of the witness in point of veracity whose credit it is intended to impeach, and stating the general nature of any disparaging facts which it is intended to prove.[7] The object for which the articles are required is, to give notice to the adverse party whose witnesses are to be objected to, that he may be prepared to meet the objection. And as it is a rule of Chancery Practice, that witnesses are not to be examined to any matters not put in issue by the pleadings, and as the character of a witness cannot in that manner be put in issue, it is obvious that any examination, as to the character of a witness, would be impertinent to the issue, and therefore must be suppressed, unless it were previously allowed, upon motion and a special order.[8] The order usually directs, that the party be at liberty to examine witnesses as to credit, and as to such particular facts only as are *not* material to what is in issue in the cause; and under it the party

[1] Shaw *v.* Lindsey, 15 Ves. 381, per Lord Eldon. And see Kirk *v.* Kirk, 13 Ves. 285.

[2] Rowley *v.* Ridley, 1 Cox, Ch. C. 281; 2 Dick. 677, S. C.

[3] Griells *v.* Gansell, 2 P. Wms. 646. And see Ingram *v.* Mitchell, 5 Ves. 297; Penderil *v.* Penderil, W. Kely, 25.

[4] Denton *v.* Jackson, 1 Johns. Ch. 526.

[5] Curre *v.* Bowyer, 3 Swanst. 357.

[6] Rowley *v.* Ridley, *supra;* Darling *v.* Staniford, 1 Dick. 358. And see Kenny *v.* Dalton, 2 Moll. 386.

[7] See 2 Dan. Ch. Pr. 1158, 1159 [*3d Amer. Ed. 976, 977], for the form of the articles. See also 1 Hoffm. Ch. Pr. 489.

[8] Mill *v.* Mill, 12 Ves. 406.

may examine witnesses as to the general reputation of the witness who is impeached, and may also contradict him as to particular facts, not material to the issue, and may prove previous declarations of the witness, contrary to what he afterwards testified on his examination.[1] No interrogatory is permitted, as to

[1] 2 Dan. Ch. Pr. 1160, 1161 [*3d Amer. Ed. 978, 979]; Vaughan *v.* Worrall, 2 Swanst. 395, and cases cited *arg.* by Sir Samuel Romilly. The doctrine on this subject was reviewed by Chancellor Kent, in Troup *v.* Sherwood, 3 Johns. Ch. 562–565; and was recognized and briefly expounded by Mr. Justice Story, in Wood *v.* Mann, 2 Sumn. 321; and afterwards more particularly in Gass *v.* Stinson, Id. 605. "The general course of practice," he observes, "is that, after publication has passed of the depositions (though it may be before), if either party would object to the competency or credibility of the witnesses, whose depositions are introduced on the other side, he must make a special application by petition to the Court, for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses, to establish the truth of the allegations in the articles by suitable proofs. Without such special order, no such examination can take place; and this has been the settled rule ever since Lord Bacon promulgated it in his Ordinances. (Ord. 72.) Upon such a petition to file articles, leave is ordinarily granted by the Court, as of course, unless there are special circumstances to prevent it. There is a difference, however, between objections taken to the competency and those taken to the credibility of witnesses. Where the objection is to competency, the Court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued; for an interrogatory might then have been put to him, directly on the point. But, if the objection was not then known, the Court will grant the application. This was the doctrine asserted by Lord Hardwicke, in Callaghan *v.* Rochfort (3 Atk. R. 643), and it has been constantly adhered to ever since. The proper mode, indeed, of making the application, in such case, seems to have been thought by the same great Judge to be, not by exhibiting articles, but by motion for leave to examine the matter, upon the foundation of ignorance at the time of the examination. But, upon principle, there does not seem to be any objection to either course; though the exhibition of articles would seem to be more formal, and, perhaps, after all, more convenient and certain in its results. But where the objection is to credibility, articles will ordinarily be allowed to be filed by the Court upon petition, without affidavit, after publication. The reason for the difference is said by Lord Hardwicke, in Callaghan *v.* Rochfort (3 Atk. R. 643), to be, because the matters examined to in such cases are not material to the merits of the cause, but only relative to the character of the witnesses. And, indeed, until after publication has passed, it cannot be known what matters the witnesses have testified to; and, therefore, whether there was any necessity of examining any witnesses to their credit. This latter is the stronger ground; and it is confirmed by what fell from the Court in Purcell *v.* McNamara (8 Ves. R. 324). When the examination is allowed to credibility only, the interrogatories are confined to general interrogatories as to credit, or to such particular facts only as are not material to what is already in issue in the cause. The qualification in the latter case (which case seems allowed only to impugn the witness's statements, as to collateral facts), is to prevent the party, under color of an examination, to credit, from procuring testimony to overcome the testimony already taken in the cause, and published, in violation of the fundamental principle of the Court, which does not allow any new evidence of the facts in issue after publication. The rule and the reasons of it are fully expounded in Purcel *v.* McNamara (8 Ves. R. 324, 326); Wood *v.* Hammerton (9 Ves. R. 145); Carlos *v.* Brock (10 Ves. R. 49, 50); and White *v.* Fussell (1 Ves. & Beam. R. 151). It was recognized and enforced by Mr. Chancellor Kent, in Troup *v.* Sherwood (3 Johns. Ch. R. 558, 562–565). When the examination is to general credit, the course in England is, to ask the question of the witnesses, whether they would believe the party sought to be discredited upon his oath. With us the more usual course is, to discredit the party by an inquiry what his general reputation for truth is; whether it is good, or whether it is bad." 2 Sumn. 608–610. And see Piggott *v.* Coxhall, 1 Sim. & Stu. 467. This course, in its strictness, is conceived to apply only in those Courts whose practice is similar to that formerly in use in the High Court of Chancery in England.

any fact already in issue in the cause; and in regard to the character of the witness, the only inquiry is as to his general reputation for truth and veracity, as has been stated in a preceding volume.[1]

[1] And see *ante*, Vol. 1, § 461, and cases there cited.

# CHAPTER III.

## OF THE EXCLUSION OF EVIDENCE.

[* § 349. Depositions may be suppressed before the hearing.
350, 351. Grounds for suppression.
352. Irregularity, from mistake where party acts in good faith does not vitiate deposition.
353. Objections made at the hearing usually those which could not have been made before, or which, if sustained, are finally fatal to the testimony.
354. As to quantity of evidence required to overbalance the answer.
355. As to impertinent, irrelevant, or immaterial evidence.
356. Sufficient that the character of the facts offered to be proved are indicated by pleadings so as not to take adverse party by surprise.
357. Evidence, inadmissible as direct testimony, may prove collateral facts.
358. Evidence of facts only which are fully admitted, inadmissible.
359. Rule as to primary and secondary evidence generally same as at law.
360–363. Parol evidence admissible to reform instrument in writing.
364. To show that an absolute conveyance was intended only as a mortgage.
365. Facts, from which implied trusts arise, may be proved by parol.
366, 367. Certain presumptions rebutted by parol testimony.
368. Competency of witnesses, except the parties, generally the same in Law and Equity.
369. When objection to competency must be taken.]

### 1. SUPPRESSION OF DEPOSITIONS BEFORE THE HEARING.

§ 349. In the course of proceedings in the Courts of Common Law, objections to the competency of testimony can be made only at the trial, when the testimony is offered; there being no existing rule, by which the questions of its admissibility can be heard by the Court at an earlier stage of the cause. But in Chancery, the objection may be heard and the point settled, either at or before the hearing of the cause.[1] Ordinarily, the time to apply for the suppression of depositions is after publication has passed: for until that time, it is seldom that it can be known whether any cause for their suppression exists. But it is not necessary to wait until publication; for if the ground of objection is previously apparent,

[1] [* "A motion to suppress testimony is, under ordinary circumstances, addressed wholly to the discretion of the Chancellor, and is one of those incidental questions in practice which must rest mainly in discretion." Partridge *v.* Stocker, 36 Vt. 110.]

in any manner whatever, the Court, on motion and proof of the fact, will make an order for suppressing the testimony.[1] Thus, where it was shown, before publication, that the deposition of the witness, who was also the agent of the party producing him, was brought, already written, to the commissioners, and taken by them in that form, it was suppressed.[2] So, where the deposition was prepared beforehand by the attorney of the party, it was suppressed before publication.[3]

§ 350. The usual grounds on which depositions are suppressed are, either that the *interrogatories are leading;* or that the interrogatories and the answers to them are *scandalous* and *impertinent;* or that the witness was *incompetent;* or that some *irregularity* has occurred in relation to the depositions. When the objection is for either of the two former causes, it is referred to a master, to ascertain and report the fact, and the question is presented to the Court upon exceptions to his report.[4] If the exceptions are sustained, the deposition will be suppressed; totally, if the objection goes to the whole, otherwise, only as to the objectionable part. Thus, if one interrogatory alone is reported as leading, the deposition as to that interrogatory only will be suppressed; and if part only of the interrogatory be leading, then that part, and so much of the answer as is responsive to it, will be suppressed.[5] And where depositions are suppressed because the interrogatories are leading, it is not usual to grant leave to re-examine the witnesses; though it will sometimes be permitted under special circumstances; as, for example, where the interrogatories were improperly framed through inadvertence, and with no improper design.[6] But no reference is ordinarily made for *impertinence alone*, not coupled with scandal;[7] unless it be on special application at the hearing of the cause;[8] or where the impertinence consists in the examination of witnesses, to discredit other witnesses, without a special order for that purpose; in which latter case there may be a refer-

[1] [* "As according to the present practice" (English) "the examination is conducted by the examiner, and many of the objections formerly applicable to evidence are abolished, it can scarcely happen that cases for the suppression of depositions will occur hereafter." 2 Dan. Ch. Pr. 3d Amer. Ed. 961.]

[2] Shaw *v.* Lindsey, 15 Ves. 380.

[3] Anon. Ambl. 252, n. 4, Blunt's ed.; 2 Dan. Ch. Pr. 1147.

[4] 2 Dan. Ch. Pr. 1141, 1143 [* 3d Amer. Ed. 961, 962, and notes].

[5] Id. 1143.

[6] Ibid.; Ld. Arundel *v.* Pitt, Ambl. 585.

[7] White *v.* Fussell, 19 Ves. 113. And see Cocks *v.* Worthington, 2 Atk. 235, 236; Pyncent *v.* Pyncent, 3 Atk. 557; 2 Dan. Ch. Pr. 1049, 1144 [* 3d Amer. Ed. 911–912].

[8] 2 Dan. Ch. Pr. 1144; Osmond *v.* Tindall, Jac. 627.

ence either before or after publication.[1] And where exceptions are taken after publication and before the hearing, for the *incompetency* of a witness, a special application is made to the Court for leave to exhibit articles, stating the facts, and praying leave to examine other witnesses to establish the truth of them; and if the facts were not known until after publication, the application will be granted.[2] The *causes* which render a witness incompetent have been considered in a preceding volume.[3]

§ 351. In regard to *irregularities* in the manner of taking depositions, when it is recollected that the mode in which they are to be taken is distinctly prescribed either in statutes or in rules of Court, or in both, it is evident that any departure from the rules so prescribed must vitiate the entire proceeding; and accordingly, in such cases, the deposition will be suppressed.[4] The irregularities, when not apparent upon the face of the proceedings, should be shown to the Court by affidavit. But there are other irregularities, occasioned by a departure from rules not expressed in formal orders, but long recognized in Chancery practice, for which also depositions will be liable to be suppressed. Thus, it is a cause of suppression, if the general interrogatory be not answered;[5] if the deposition be taken before persons, some of whom are not named in the commission;[6] if a joint commission be not executed by all the commissioners;[7] if the cross-interrogatories be not put;[8] if all

[1] Mill *v.* Mill, 12 Ves. 407.

[2] Callaghan *v.* Rochfort, 3 Atk. 643; Gass *v.* Stinson, 2 Sumn. 608. Objections to the competency of a witness, *if known*, and not made at the time of taking a deposition under the act of Congress, will be deemed to have been waived. United States *v.* Hair-pencils, 1 Paine, 400. So, where a witness, *known* to be incompetent, was cross-examined, this is a waiver of the objection, on the part of the party by whom he was cross-examined. Charitable Corp. *v.* Sutton, 2 Atk. 403; Corp. of Sutton *v.* Wilson, 1 Vern. 254.

[3] See *ante*, Vol. 1, Part 3, ch. 2, §§ 326–430.

[4] See *ante*, Vol. 1, §§ 320–324, for the manner in which depositions, in general, are to be taken. The peculiarities of local practice in the State Courts are foreign from the design of this work.

[5] Richardson *v.* Golden, 3 Wash. 109; Dodge *v.* Israel, 4 Wash. 323. [So depositions taken after an appeal from the lower Court will be suppressed. Perkins *v.* Testerment, 3 Iowa, 307. Where a defect or omission is apparent on the face of depositions, the usual practice in Chancery is to move to suppress them, but not to exclude them for irrelevancy, or on account of the matter deposed to. Vaugine *v.* Taylor, 18 Ark. 65.]

[6] Willings *v.* Consequa, 1 Pet. C. C. R. 301; Banert *v.* Day, 3 Wash. 243. So, where it appeared that the evidence had been taken by a clerk to the commissioners, and the effect of some of the depositions had been communicated to the agent of the other side. Lennox *v.* Munnings, 2 Y. & J. 483.

[7] Armstrong *v.* Brown, 1 Wash. C. C. R. 43.

[8] Gilpins *v.* Consequa, 3 Wash. 184; Bell *v.* Davidson, Id. 328. And see Davis *v.* Allen, 14 Pick. 213; Bailis *v.* Cochran, 2 Johns. 417. But see, for a qualification of this rule, *ante*, Vol. 1, § 554. The refusal of the witness to be cross-examined is no cause for suppressing the deposition; but is punishable as a contempt. Courtenay *v.* Hoskins, 2 Russ. 253. The effect of the want of a cross-examination, upon the admissibility of the deposition, was fully considered by Story, J., in Gass *v.*

proper interrogatories on either side do not appear to have been

Stinson, 3 Sumner, 98. That case, being before a master, and the plaintiffs being desirous of the testimony of a witness who was dangerously ill, a commissioner was agreed on by the parties to take his answers to interrogatories; and they were accordingly taken to the interrogatories filed by the plaintiff; no objection being made to the commissioner's proceeding immediately, upon those interrogatories alone, until others could be filed, saving to the defendant all other benefit of exception. The witness lived several months afterwards, during which the commissioner proceeded with the examination from time to time, as the witness was able to bear it; but before the filing of any cross-interrogatories, and after answering, on oath, all the direct interrogatories, the witness died. The defendant objected to the admission of the deposition, for the want of a cross-examination; but the master admitted it; and for this cause, among others, his report was excepted to. The learned Judge, on this point, delivered his opinion as follows: "The general rule at law seems to be, that no evidence shall be admitted, but what is or might be under the examination of both parties. So the doctrine was laid down by Lord Ellenborough, in Cazenove *v.* Vaughan (1 Maule & Selw. R. 4, 6), and his Lordship on that occasion added: 'And it is agreeable to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete.' The same principle seems recognized in Attorney-General *v.* Davison (1 McClel. & Younge, R. 160). But neither of these cases called for an explicit declaration as to what would be the effect of a regular, direct examination, where the party had died before any cross-examination. In ——— *v.* Brown (Hardres, R. 315), in the case of an ejectment at law, the question occurred, whether the examination of a witness, taken *de bene esse* to preserve his testimony upon a bill preferred and before answer, upon an order of Court, where the witness died before he could be examined again, and he being sick all the mean time, so that he could not go to be examined, was admissible on the trial of the ejectment; and it was ruled, after consultation with all the Judges, that it could not be, 'because it was taken before issue joined in the cause; and he might have been examined after.' From what is said in the same book in Watt's case (Hardres, R. 332), it seems to have been held, at that time, that, if witnesses are examined *de bene esse* before answer upon a contempt, such depositions cannot be made use of in any other Court but the Court only where they were taken. And the reason assigned is, 'because there was no issue joined, so as there could be a legal examination.' It may well be doubted, if this doctrine would prevail in our day, at least in Courts of Equity. Indeed, it seems directly against the decision of the Court of King's Bench in Cazenove *v.* Vaughan (1 Maule & Selw. R. 4, 6), for in that case it was ruled, that a deposition taken *de bene esse*, where the party might have cross-examined, and did not do so, nor take any step to obtain a cross-examination, might be read in a trial at law, the witness having gone abroad. On that occasion, the Court said: 'If the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same as if he had cross-examined; otherwise the admissibility of the evidence would depend upon his pleasure, whether he will cross-examine or not, which would be a most uncertain and unjust rule.'

"But it is the more important to consider how this matter stands in Equity; for, although the rules of evidence are, in general, the same in Equity as at Law, they are far from being universally so.

"It seems clear, that in Equity, a deposition is not, of course, inadmissible in evidence, even if there has been no cross-examination, and no waiver of the right. Thus, if a witness, after being examined on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of the benefit of his direct testimony; for, upon application to the Court, the witness would have been compelled to answer. So it was held in Courtenay *v.* Hoskins (2 Russ. R. 253). But if the witness should secrete himself, to avoid a cross-examination, there the Court would, or at least might, suppress the direct examination. Flowerday *v.* Collet (1 Dick. R. 288). In such a case a cross-examination is still possible; and the very conduct of the witness, in secreting himself, has a just tendency to render his direct examination suspicious.

"But where the direct interrogatories have been fully answered, and an inevitable accident occurs, which, without any fault on either side, prevents a cross-examination, I do not know that a like rule has been established, or that the deposition has been suppressed. So far as authorities go, they incline the other way. In Arundel *v.* Arundel (1 Chan. R. 90), the very case occurred. A witness was

substantially answered;[1] if the deposition is in the handwriting of the party, or his agent, or his attorney;[2] if it is taken after argument of the cause, without a special order;[3] if it was copied by

examined for the plaintiff, and was to be cross-examined for the defendant; but before he could be cross-examined he died. Yet the Court ordered the deposition to stand. Copeland *v.* Stanton (1 P. Wms. R. 414) is not an adverse authority; for, in that case, the direct examination was not completed, and the witness had not signed the deposition, so far as it went; and the examination being postponed to another day, he was the next morning taken suddenly ill, and died. The Court denied the motion to allow the deposition, as far as it had been taken. But the Court refused, because the examination was imperfect; and, indeed, until the witness had signed the examination, he was at liberty to amend and alter it in any part. In O'Callaghan *v.* Murphy (2 Sch. & Lefr. R. 158), Lord Redesdale allowed the deposition of a witness, whose examination had been completed, but who died before his cross-examination could be had, to be read at the hearing, deeming it proper evidence, like the case of a witness at Nisi Prius, who, after his examination, and before his cross-examination, should suddenly die, under which circumstances, he thought, that the party producing him would not lose the benefit of the evidence he had already given. But the want of such cross-examination ought to abate the force of the testimony. However, the point was not positively and finally ruled, as, upon examining the cross-interrogatories, they were not found to apply to anything to which the witness had testified in his direct examination, and therefore the deposition was held admissible. In Nolan *v.* Shannon (1 Molloy, R. 157), the Lord Chancellor held, that the direct examination of a witness might be read at the hearing, where a cross-examination had been prevented by his illness and death. My own researches, and those of the counsel, have not enabled me to find any other cases, in which the question has been raised; and in the latest Book of Practice (1 Smith's Chan. Pr. 294), no other case is alluded to on the subject, than that of Copeland *v.* Stanton (1 P. Wms. R. 414). So that the general doctrine is far from being established in the manner which the argument for the defendant has supposed, and appears strongly to lead the other way.

"But if it were, I should have no doubt, that the special circumstances of this case would well create an exception. The direct examination was taken by consent. No cross-interrogatories were ever filed. The witness lived several months after the original examination was begun; and there is not the slightest proof, that, if the cross-interrogatories had been filed, they might not have been answered. Under such circumstances, I am of opinion, that the omission to file the cross-interrogatories was at the peril of the defendant. I do not say that he was guilty of laches. But I put it upon this, that, as his own delay was voluntary, and the illness of the witness well known, the other party is not to be prejudiced by his delay. His conduct either amounted to a waiver of any objection of this sort, or to an election to take upon himself the whole hazard of the chances of life. It appears to me, that the case falls completely within the principles laid down in Cazenove *v.* Vaughan (1 Maule & Selw. R. 4, 6)." See 3 Sumn. 104 – 108. [* The affidavit of a witness who dies before he can be cross-examined is admissible, unless the witness had kept out of the way to avoid cross-examination. Davies *v.* Otty, 34 L. J. Chanc. 252. A plaintiff whose evidence was of great importance to the issue in the suit, made an affidavit which was duly sworn and filed. He then died. No notice of the affidavit was given to the defendant, and they had not cross-examined the plaintiff upon it. The Court allowed the affidavit to be received at the hearing of the cause on motion for decree. Tanswell *v.* Scurrah, 11 L. T. N. S. 761.]

[1] Bell *v.* Davidson, *supra*. And see Moseley *v.* Moseley, Cam. & Nor. 522. But if substantially answered, it is sufficient. Nelson *v.* United States, 1 Pet. C. C. R. 235, 237. [* A deposition is not to be wholly rejected for the omission of the witness to answer a particular interrogatory fully, unless his answer is so imperfect or evasive as to induce the Court to believe that he wilfully kept back material facts within his knowledge. Stratford *v.* Ames, 8 Allen, 579.] Misbehavior of the witness, in giving his testimony, may also be cause for suppressing it. Phillips *v.* Thompson, 1 Johns. Ch. 139, 140.

[2] Moseley *v.* Moseley, *supra;* Allen *v.* Rand, 5 Conn. 322; Amory *v.* Fellowes, 5 Mass. 219, 227; Burtch *v.* Hogge, Harringt. Ch. 31. And see Smith *v.* Smith, 2 Greenl. 408.

[3] Dangerfield *v.* Claiborne, 4 Hen. & Munf. 397; [or after appeal from the lower Court, Perkins *v.* Testerment, 3 Iowa, 307.]

the deponent in the commissioner's presence, from a paper which the deponent had previously drawn up at a different place;[1] or which was otherwise previously prepared;[2] if the commissioner is found to have been the agent, attorney, landlord, partner, near relative, or creditor of the party in whose behalf he was nominated; or was otherwise unfit, by reason of interest or partiality, to execute the commission.[3] But it is to be noted, that where a party cross-examines a witness upon the merits, this, so far as regards himself alone, and not his co-parties, is a waiver of objection to any previous irregularity in the taking of the deposition, and of any objection to his competency, which was then known;[4] and that all objections to depositions *which might have been obviated by a re-examination of the witness*, will be considered as waived, unless made before the hearing.[5]

[1] United States *v.* Smith, 4 Day, 126; Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339, 346.

[2] Shaw *v.* Lindsey, 15 Ves. 380. And see 4 Inst. 279, ad calc.

[3] 2 Dan. Ch. Pr. 1076, 1077 [*3d Amer. Ed. 927]. In *New Hampshire*, an uncle of the party has been held incompetent to take a deposition in the cause. Bean *v.* Quimby, 5 N. Hamp. 94. In *Massachusetts*, a son-in-law was held competent, under the circumstances of the case. Chandler *v.* Brainard, 14 Pick. 285. But in both cases the doctrine of the text was asserted. And see Ld. Mostyn *v.* Spencer, 6 Beav. 135; Wood *v.* Cole, 13 Pick. 279; Coffin *v.* Jones, Id. 441.

[4] Mechanics' Bank *v.* Seton, 1 Pet. 299, 307; Bogert *v.* Bogert, 2 Edw. Ch. R. 399; Gass *v.* Stinson, 2 Sumn. 605; Charitable Corp. *v.* Sutton, 2 Atk. 403; Sutton *v.* Wilson, 1 Vern. 254. And see *ante*, Vol. 1, § 421. The rule on this subject is, that the party, objecting to the competency of testimony, ought to take the exception as soon as the cause of it comes to his knowledge. Lord Eldon held, that the party, in such case, was bound to make it reasonably clear, that at the date of the examination of the witness, he had no knowledge of the objection; otherwise, he would be deemed to have waived it. Vaughan *v.* Worrall, 2 Swanst. 400. The reason of the rule, and its qualification in Equity, were thus stated by Sir Wm. Grant, M. R., in Moorhouse *v.* De Passou, 19 Ves. 434: "At Law, a party waives any objection to the competence of a witness by pursuing his cross-examination, after the witness appears to be interested. Formerly, the inquiry, whether a witness was interested, could be made only upon the *voir dire;* now, if the interest comes out at any period, his evidence is rejected. Here there is no such opportunity of inquiring into the competence of the witness by the *voir dire:* and until the depositions are published, it cannot be known whether the witness has, or has not, admitted the fact upon which the objection arises. The waiver at Law arises from pursuing the examination, after the objection to the competence of the witness is known; but it is difficult to say, how an unknown objection can be waived. The witness may deny all interest in the cause; and upon the supposition that he is competent, it may be very material to the other party to cross-examine him. Under these circumstances the principle leads to this conclusion, that in Equity the cross-examination of a witness in utter ignorance of his having given an answer to an interrogatory, showing that he has an interest in the cause, cannot amount to a waiver of the objection to his competence." The exhibition of articles to discredit a witness is also held a waiver of any objection on the ground of irregularity in taking the deposition. Malone *v.* Morris, 2 Moll. 324.

[5] Kimball *v.* Cook, 1 Gilm. 423. In Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339, it appeared by the examiner's certificate, that the examination commenced June 28, and was continued to July 5; and for this cause it was moved to suppress the deposition; but the motion was refused by Chancellor Kent, who observed, that, "It would seem to be too rigorous, when the other party has had the benefit of a cross-examination, and has not raised the objection until the hearing, *when no re-*

§ 352. But though the Court is generally strict in requiring a compliance with its rules of practice in regard to the taking of depositions; yet where an irregularity has evidently arisen from *mistake*, and the party has *acted in good faith*, it will *permit the deposition to stand;* and this, especially, where the other party has done anything which may have sanctioned the proceeding.[1] In such cases, if the mistake is capable of correction in Court, or can be otherwise relieved, the Court, in its discretion, will either *amend the deposition*, or otherwise afford the appropriate remedy.[2] Thus, where, after the examination of the plaintiff's witnesses, under a commission, it was discovered that the *title of the cause* was accidentally *mistaken* in the commission, the Court refused to suppress the depositions, but ordered the clerk to amend the commission in that particular, and granted a new commission for the examination of the defendant's witnesses.[3] So, where a witness was inadvertently examined and cross-examined two days *after publication*, the Court refused to suppress the deposition.[4] So where depositions were taken abroad, and the commissioners refused to allow the defendant a *reasonable time* to prepare cross-interrogatories, the Court would not suppress the depositions, but granted the defendant a new commission, to other commissioners, for the cross examination of the plaintiff's witnesses, and the examination of his own.[5] And here it may be added that, though it is a general rule that depositions, once suppressed, cannot be used in the same cause, yet, where the objection does not go to the competency of the witness, if it should happen that the witness could not be examined again, the order of suppression does not go the length of preventing the Court from afterwards directing that the deposition

*examination can be had*, and when no ill use is stated to have been made of the irregularity. The question whether the deposition shall be suppressed, is a matter of discretion; and in Hammond's case, Dick. 50, and in Debrox's case, cited 1 P. Wms 414, the deposition of a witness, examined after publication, was admitted; in the one case, because the opposite party had cross-examined, and in the other because the testimony would otherwise have been lost forever." 2 Johns. Ch. 345.

[1] 2 Dan. Ch. Pr. 1145, 1146 [* 3d Amer. Ed. 961–962. "A deposition ought not to be suppressed for a failure to comply with the rules in a mere matter of form, unless such failure proceeds from bad faith, rather than from accident and mistake." Partridge *v.* Stocker, 36 Vt. 109.]

[2] See, as to amending depositions, *supra*, § 347.

[3] Robert *v.* Millechamp, 1 Dick. 22. And see O'Hara *v.* Creap, 2 Irish Eq. R. 419.

[4] Hammond *v.* ——, 1 Dick. 50. So where the depositions were taken during an abatement of the suit, the fact not being known at the time. Sinclair *v.* James, 1 Dick. 277.

[5] Campbell *v.* Scougall, 19 Ves. 552. For other instances, see Curre *v.* Bowyer, 3 Swanst. 357; Lincoln *v.* Wright, 4 Beav. 164; Pearson *v.* Rowland, 2 Swanst. 266.

may be opened, if necessity should require that the rule be dispensed with.[1]

2. OBJECTIONS AT THE HEARING.

§ 353. The causes already mentioned, for which depositions may be suppressed before the hearing may also be shown at the hearing with the same effect. But we have seen the reluctance of the Court to suffer testimony to be lost, by any accidental defect or irregularity, not going to the merits, and capable of supply or amendment; and the readiness with which its discretionary powers will be exerted to cure defects and prevent the delay of justice. Hence it is that objections, capable of being obviated in any of the modes we have mentioned, either by amendment in open Court or by a new commission, new interrogatories or a re-examination, are seldom made at so late a stage of the cause as the hearing; the usual effect being unnecessarily to increase the expense, and to cause delay; circumstances which the Judge may not fail to notice, to the party's disadvantage, in the subsequent disposition of the cause. The objections usually taken at the hearing are therefore those only which were until then undiscovered, or incapable of being accurately weighed, or which, if sustained, are finally fatal to the testimony. Of this nature are deficiencies in the amount of the proof required to overbalance the weight of the answer; impertinence or irrelevancy of the testimony; its inadmissibility to control the documentary, or other written evidence in the cause, or to supply its absence; its inferior nature to that which is required; and the incompetency of the witnesses to testify, either generally in the cause, or only to particular parts of the matters in issue. Some of these subjects, so far as they have been treated in a preceding volume, will not here be discussed; our present object being confined to that which is peculiar to proceedings in Equity.

§ 354. And *first*, in regard to the *quantity of proof* required to overbalance the answer. We have already seen[2] that, where the answer is responsive to the allegations in the bill, and contains clear and positive denials thereof, it must prevail; unless it is overcome by the testimony of one positive witness, with other ad-

[1] Shaw *v.* Lindsey, 15 Ves. 381, per Lord Eldon.

[2] *Supra*, § 289. See also *ante*, Vol. 1, § 260; Alam *v.* Jourdan, 1 Vern. 161; Mortimer *v.* Orchard, 2 Ves. 244; Walton *v.* Hobbs, 2 Atk. 19; Smith *v.* Brush, 1 Johns. Ch. 461; 2 Poth. Obl. App. No. 16, by Evans, pp. 236–242.

minicular proofs sufficient to overbalance it, or by circumstances alone sufficient for that purpose. This rule, whatever may have been its origin or principle, is now perfectly well settled as a rule of evidence in Chancery. The testimony of a single witness, however, is not in such cases utterly rejected; but when it is made apparent to the Court that the positive answer is opposed only by the oath of a single witness, unaided by corroborating circumstances, the opposing testimony is simply treated as insufficient; but is not suppressed; for the Court will still so far lay stress upon it, as it serves to explain any collateral circumstances;[1] and the circumstances, thus explained, may react, so as to give effect to the evidence by the operation of the rule, that one witness, with corroborating circumstances, may prevail against the answer.[2]

§ 355. *Secondly*, as to the objection that the evidence is *impertinent*, or *irrelevant*, or *immaterial*, terms which, in legal estimation and for all practical purposes, are generally treated as synonymous; the character of this kind of testimony, and the principle on which it is rejected at Law, have already been sufficiently considered.[3] It is unimportant whether the evidence relates to matters not contained in the pleadings; or to matters admitted in the pleadings, and therefore not in issue; or to matters which, though in issue, are immaterial to the controversy, and therefore not requisite to be decided; as in either case it is equally open to objection. And the rule in Equity is substantially the same as at Law. Thus, in regard to *matters not contained in the pleadings*, where the bill was for specific performance of a contract for the purchase of an estate, by bidding it off at auction, and the defence was, that puffers were employed, proof of the additional fact, that the auctioneer declared that no bidder on the part of the plaintiff was present, was rejected.[4] So, where the bill was to set aside a sale, on the ground of fraud practised by the defendant against the plaintiff, evidence that the defendant was the plaintiff's attorney at the time of sale, as the fact from which the fraud was to be inferred, was rejected, because not stated in the bill.[5]

§ 356. It is *not necessary*, however, that *all the specific facts* to

[1] Anon., 3 Atk. 270; E. Ind. Co. *v.* Donald, 9 Ves. 283.

[2] Gresley, Eq. Ev. pp. 4, 227.

[3] *Ante*, Vol. 1, §§ 49–55. And see Cowan *v.* Price, 1 Bibb, 473; Langdon *v.* Goddard, 2 Story, R. 267; Knibb *v.* Dixon, 1 Rand. 249; Contee *v.* Dawson, 2 Bland, 264; Piatt *v.* Vattier, 9 Pet. 405. Proofs without allegations, and allegations without proof, are alike to be disregarded. Hunt *v.* Daniel, 6 J. J. Marsh. 398.

[4] Smith *v.* Clarke, 12 Ves. 477, 480.

[5] Williams *v.* Llewellyn, 2 Y. & J. 68.

be proved should be stated in the pleadings; it is sufficient that their character be so far indicated by the pleadings as to prevent any surprise on the other party; and hence it is that circumstances, not specifically alleged, may often be proved under general allegations. Thus, for example, where there is a general allegation that a person is *insane*, or is *habitually drunken*, or is of a *lewd and infamous character;* evidence of particular instances of the kind of character, thus generally alleged, is admissible.[1] So, where the bill was for specific performance of an agreement to continue the plaintiff in an office, and in the answer it was alleged that the plaintiff had not accounted for *divers fees* which he had received by virtue of the office, and had concealed *several instruments and writings* belonging to the office; evidence of particular instances and acts of the misbehavior alleged was admitted.[2] And where, in a bill by an executor for relief against certain bonds given by the testator, alleged to have been extorted from him by threats and menaces and by undue means, and not for any real debt, it was answered that the bonds were for money lent and for other debts; evidence that the defendant was a *common harlot*, and that the bonds were given *ex turpi causâ* was held admissible.[3] But the general allegation, in cases of this class, must be so far specific as to show the nature of the particular facts intended to be proved. Therefore, where, to a bill by the wife, against her husband, for the specific performance of marriage articles, the defendant answered that the wife had withdrawn herself from him, and had lived separately, and *very much misbehaved herself;* evidence of particular acts of adultery was held inadmissible, as not being with sufficient distinctness put in issue by so general a charge.[4]

§ 357. But it does not follow that evidence, inadmissible as direct testimony, is therefore to be utterly rejected; for such evidence may sometimes be admitted in proof of *collateral facts*, leading by way of *inducement* to the matter directly in issue. Thus, in a bill to impeach an award, testimony relating to the merits, though on general grounds inadmissible, may be read for the purpose of throwing light on the conduct of the arbitrators.[5] So in a bill by

[1] Whaley *v.* Norton, 1 Vern. 484; Clark *v.* Periam, 2 Atk. 337; Carew *v.* Johnston, 2 Sch. & Lefr. 280.

[2] Wheeler *v.* Trotter, 3 Swanst. 174, n.

[3] Matthew *v.* Hanbury, 2 Vern. 187.

[4] Sidney *v.* Sidney, 3 P. Wms. 269, 276.

[5] Goodman *v.* Sayers, 2 J. & W. 259. For the application of a similar principle at Law, see Gibson *v.* Hunter, 2 H. Bl. 288; Bottomley *v.* United States, 1 Story,

the vendee, to set aside a contract for the purchase of lands, on the ground of fraudulent misrepresentations by the vendor, evidence of the like misrepresentations, contemporaneously made to others, is admissible in proof of the alleged fraudulent design.[1] And on a kindred principle, facts apparently irrelevant may sometimes be shown, for the purpose of establishing a more general state of things, involving the matter in issue; as, for example, where acts of ownership exercised in one spot have been admitted to prove a right in another, a reasonable probability being first made out that both were once parcels of the same estate belonging to one owner, and subject to one and the same burden.[2]

§ 358. In regard to *facts already admitted in the pleadings*, evidence in proof or disproof of which is therefore inadmissible, the rule applies only where the admission is full and unequivocal, and therefore conclusive upon the party; and this will be determined by the Court, in its discretion, upon the circumstances of the particular case.[3]

§ 359. *Thirdly*, as to the objection, that the evidence offered is inadmissible as a *substitute for better evidence*, alleged to exist or to *control the effect of a writing*. The subject of primary and secondary evidence, and the duty of the party to produce the best evidence which the nature of the case admits, having been treated in a preceding volume,[4] it is sufficient here to observe, that the principles and distinctions there stated are recognized as well in Equity as at Law. In some cases, however, which fall under the maxim — *Omnia præsumuntur, in odium spoliatoris* — Courts of Equity will go beyond Courts of Law, in giving relief, by reason of the greater flexibility of its modes of remedy. Thus, where the king had a good title in reversion at law, as against the heir in tail, but "the deeds whereby the estate was to come to him were not extant, but *very vehemently suspicious* to have been suppressed and withholden by some under whom the defendants claimed"; it was decreed, that the king should hold and enjoy the land *until the defendants should produce the deeds*.[5]

§ 360. In regard to the *admissibility of parol evidence to control*

R. 143 – 145; Crocker *v.* Lewis, 3 Sumn. I; *Supra*, § 15.

[1] Bradley *v.* Chase, 9 Shepl. 511.

[2] Gresley, Eq. Evid. p. 236; Tyrwhitt *v.* Wynne, 2 B. & A. 554. And see *ante*, Vol. 1, § 52.

[3] Gresley, Eq. Evid. pp. 237, 238.

[4] *Ante*, Vol. 1, §§ 82 – 97, 105, 161, 168.

[5] Rex. *v.* Arundel, Hob. 109, commented on, 2 P. Wms. 748. And see Dalston *v.* Coatsworth, 1 P. Wms. 731, and cases there collected; Saltern *v.* Melhuish, Ambl. 247; *Ante*, Vol. 1, § 37.

*the effect of a writing*, we have already seen that the rule, subject to the modifications which were stated under it,[1] is inflexible, that extrinsic verbal evidence is not admissible, at law, to contradict or alter a written instrument. In equity, the same general doctrine is admitted; subject, however, to certain other modifications, necessarily required for that relief which Equity alone can afford. For equity relieves, not only against fraud, but against accidents and the mistakes of parties; and whenever a written instrument, in its terms, stands in the way of this relief, it is obvious that parol evidence ought to be admitted, to show that the instrument does not express the intention of the parties, or, in other words, to control its written language by the oral language of truth. It may express more, or less, than one of the parties intended; or, it may express something different from that which they both intended; in either of which cases, and in certain relations of the parties before the court, parol evidence of the fact is admissible as indispensable to the relief. The principle upon which such evidence is admitted is, not that it is necessary, for the sake of justice, to violate a sound rule of law by contradicting a valid instrument which expresses the intent and agreement of the parties; but, that the evidence goes to show, that, by accident or mistake, the instrument does not express their meaning and intent; and to establish an equity, *dehors* the instrument, by proving the existence of circumstances, entitling the party to more relief than he can have at law, or rendering it inequitable that the instrument should stand as the true exponent of his meaning. These facts being first established,[2] as independent grounds of equitable relief, the court, in the exercise of its peculiar functions as a court of equity, will proceed to afford that relief, and, as incidental to or a part of such relief, will decree that the instrument be so reformed as to express what the parties actually meant to express, or that it be cancelled, or held void, or that the obligor be absolved from its specific performance, as the case may require.[3]

[1] *Ante*, Vol. 1, §§ 275–305.

[2] [* The proof must be such as will strike all minds alike, as being unquestionable, and free from reasonable doubt. Tucker *v.* Madden, 44 Maine R. 206; Hileman *v.* Wright, 9 Ind. R. 126; Davidson *v.* Greer, 3 Sneed, 384; Ruffner *v.* McConnell, 17 Ill. R. 212; Linn *v.* Barkey, 7 Ind. R. 69. See Leuty *v.* Hillas, 2 De G. & J. 110.]

[3] This important distinction was adverted to by Lord Thurlow, in the case of Irnham *v.* Child, 1 Bro. C. C. 92, and was afterwards more fully expounded by Lord Eldon, in Townsend (Marq.) *v.* Stangroom, 6 Ves 328, in the following terms: "It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in Equity, when

§ 361. Therefore, where the bill is for the *specific performance* of a contract in writing, parol evidence is admissible in equity to

once the Court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at Law; but all the doctrine of the Court, as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the Court will not execute, must be struck out, if it is true, that, because parol evidence should not be admitted at Law, therefore it shall not be admitted in Equity upon the question, whether, admitting the agreement to be such as at Law it is said to be, the party shall have a specific execution, or be left to that Court, in which, it is admitted, parol evidence cannot be introduced. A very small research into the cases will show general indications by Judges in Equity, that that has not been supposed to be the law of this Court. In Henkle *v.* The Royal Exchange Assurance Co. (1 Ves. 317), the Court did not rectify the policy of insurance; but they did not refuse to do so upon a notion, that, such being the legal effect of it, therefore this Court could not interfere; and Lord Hardwicke says expressly, there is no doubt the Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof, that would be rectified. This is loose in one sense, leaving it to every Judge to say, whether the proof is that proper proof that ought to satisfy him; and every Judge, who sits here any time must miscarry in some of the cases, when acting upon such a principle. Lord Hardwicke, saying the proof ought to be the strongest possible, leaves a weighty caution to future Judges. This inconvenience belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence; which may lead to different decisions upon the same case. In Lady Shelburne *v.* Lord Inchiquin (1 Bro. C. C. 338) it is clear Lord Thurlow was influenced by this, as the doctrine of the Court; saying (1 Bro. C. C. 341) it was impossible to refuse, as incompetent, parol evidence, which goes to prove, that the words taken down in writing were contrary to the concurrent intention of all parties; but he also thought it was to be of the highest nature; for he adds, that it must be irrefragable evidence. He therefore seems to say, that the proof must satisfy the Court what was the concurrent intention of all parties; and it must never be forgot, to what extent the defendant, one of the parties, admits or denies the intention. Lord Thurlow saying, the evidence must be strong, and admitting the difficulty of finding such evidence, says, he does not think it can be rejected as incompetent.

"I do not go through all the cases, as they are all referred to in one or two of the last. In Rich *v.* Jackson, there is a reference to Joynes *v.* Statham, and a note of that case preserved in Lord Hardwicke's manuscript. He states the proposition in the very terms; that he shall not confine the evidence to fraud; that it is admissible to mistake and surprise; and it is very singular, if the Court will take a moral jurisdiction at all, that it should not be capable of being applied to those cases, for in a moral view there is a very little difference between calling for the execution of an agreement obtained by fraud, which creates a surprise upon the other party, and desiring the execution of an agreement, which can be demonstrated to have been obtained by surprise. It is impossible to read the report of Joynes *v.* Statham, and conceive Lord Hardwicke to have been of opinion, that evidence is not admissible in such cases; though I agree with Lord Rosslyn that the report is inaccurate. Lord Rosslyn expressly takes the distinction between a person coming into this Court, desiring that a new term shall be introduced into an agreement, and a person admitting the agreement, but resisting the execution of it by making out a case of surprise. If that is made out, the Court will not say the agreement has a different meaning from that which is put upon it; but supposing it to have that meaning, under all the circumstances it is not so much of course that this Court will specifically execute it. The Court must be satisfied, that under all the circumstances it is equitable to give more relief than the plaintiff can have at law; and that was carried to a great extent in Twining *v.* Morrice (2 Bro. C. C. 326). In that case it was impossible to impute fraud, mistake, or negligence; but Lord Kenyon was satisfied the agreement was obtained by surprise upon third persons; which therefore it was unconscientious to execute against the other party interested in the question. It has been decided frequently at law, that there could be no such thing as a puffer at an auction. That whether right or wrong, has been much disputed here. (Conolly *v.* Parsons, 3 Ves. Ch. R. 625, note.) In that case we contended,

show, that by mistake, not originated in the defendant's own gross carelessness, the writing expresses something materially different from his intention, and that therefore it would be unjust to enforce him to perform it.[1] Thus, where a bill was filed for the specific performance of an agreement to convey certain premises, which, as the defendant alleged, included, by mistake, a parcel not intended to be conveyed; parol evidence of this fact was admitted, and the bill was thereupon dismissed.[2] So, where the bill was for the specific performance of an agreement to make a lease, upon a certain rent; the defendant was admitted to show, by oral evidence, that the rent was to be a clear rent, the plaintiff paying all taxes. And where a mortgage was intended to be made by two deeds, the one absolute, and the other a defeasance, which latter the mortgagee omitted to execute, the mortgagor was admitted to show the mistake. And in these cases it makes no difference in the principle of relief, whether the omission is charged as a pure and innocent mistake, or as a fraud.[3] But the mistake must be a *mistake of fact;* for as to mistakes of law, though the decisions are somewhat conflicting, yet the weight of authority is now clearly preponderant, that mere *mistakes of law* are not remediable, except in a few cases, peculiar in their character, and involving other elements in their decision.[4]

that all the parties in the room ought to know the law. Lord Kenyon would not hear us upon that; and I do not much wonder at it; but Blake being the common acqnaintance of both parties, and having no purpose to bid for the vendor, unfortunately was employed to bid for the vendee; and others, knowing that he was generally employed for the vendor, thought the bidding was for him. Lord Kenyon said, that was such a surprise upon the transaction of the sale, that he would leave the parties to law; and yet it was impossible to say, that the vendee appointing his friend, without the least notion, much less intention, that the sale should be prejudiced, was fraud, surprise, or anything that could be characterized as morally wrong. That case illustrates the principle, that circumstances of that sort would prevent a specific performance; and that it is competent to this Court, at least for the purpose of enabling it to determine whether it will specifically execute an agreement, to receive evidence of the circumstances under which it was obtained; and I will not say, there are not cases, in which it may be received, to enable the Court to rectify a written agreement, upon surprise and mistake, as well as fraud; proper, irrefragable evidence, as clearly satisfactory that there has been mistake or surprise, as in the other case, that there has been fraud. I agree, those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence." 6 Ves. 333–339.

[1] King *v.* Hamilton, 4 Pet. 311, 328; Western R. R. Co. *v.* Babcock, 6 Met. 346; Adams, Doctr. of Eq. p. 84; 1 Story, Eq. Jur. §§ 152–156; *Ante,* Vol. 1, § 296 *a.*

[2] Calverley *v.* Williams, 1 Ves. 210.

[3] Joynes *v.* Statham, 3 Atk. 388; Mason *v.* Armitage, 13 Ves. 25. And see Rich *v.* Jackson, 4 Bro. C. C. 514; 6 Ves. 334, S. C.; Townsend (Marq.) *v.* Stangroom, 6 Ves. 328; Hunt *v.* Rousmaniere, 8 Wheat. 174, 211; Brainerd *v.* Brainerd, 15 Conn. 575; Fishell *v.* Bell, 1 Clark, 37.

[4] Hunt *v.* Rousmaniere, 1 Pet. 15; Bank

§ 362. Upon the same general principle of equitable relief, where the bill seeks that a contract may be *rescinded*, or *cancelled*, or *given up*, parol evidence is admissible to prove extraneous facts and transactions, inconsistent with the terms of the contract, and thus indirectly contradicting them.[1]

§ 363. So, where the bill is brought to *reform a written instrument of contract*, or of *conveyance*, whether it be executory or executed being immaterial, parol evidence is generally admissible to show a mistake in the instrument. But the proof in this case must be of a *mutual mistake;* for though a mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance, it is only where the mistake is mutual that equity will decree an *alteration in the terms* of the instrument.[2] Whether this ought to be done upon merely verbal evidence, where there is no previous article or memorandum of agreement or other proof in writing, by which to reform the instrument, has sometimes been doubted, but is now no longer questioned. The written evidence may be more satisfactory, but the verbal evidence is clearly admissible; for the written evidence may be only a letter, or a memorandum, of no higher degree, in legal estimation, than oral testimony, though more distinct and certain in the conviction it may produce. It is therefore only required that the mistake be either admitted, or distinctly proved, to the satisfaction of the court; and though the undertaking may be one of great difficulty, especially against the positive denial of the answer, yet the reported cases show that this may be done. The language of the learned Judges on this point implies no more than this, that in determining whether such proof has been given,

United States *v.* Daniel, 12 Pet. 32, 55; 1 Story, Eq. Jur. 116. [*McAninch *v.* Laughlin, 13 Penn. St. R. 371; *contra*, Wyche *v.* Green, 16 Geo. R. 49, 58. There is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the *true intention* of the parties and introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious that the intention should be carried out. Stoutenburgh *v.* Tompkins, 1 Stockton Ch. (N. J.) 332.]

[1] 1 Story, Eq. Jur. 161; 2 Story, Eq. Jur. § 694 [*Ib. Redfield's Ed. Vol. 1, §§ 694, 694 *a*]; Mitford's Plead. in Eq. p. 103 (3d ed.); Boyce *v.* Grundy, 3 Pet. 210.

[2] Adams, Doctr. of Equity, p. 171; 1 Story, Eq. Jur. §§ 155, 157. And see the notes to Woollam *v.* Hearn, in White & Tudor's Leading Cases in Equity (Am. ed.), by Hare & Wallace, Vol. 2, Part 1, pp. 546 – 596, where all the cases on this subject are collected and reviewed. [But Equity will interfere only as between the original parties, or those claiming under them in privity; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. As against *bonâ fide* purchasers for a valuable consideration without notice, Courts of Equity will grant no relief. 1 Story, Eq. Jur. § 165, and cases cited.] [*Also same, Redfield's Ed. §§ 164 *a* – 164 *g*, and notes containing the latest cases.]

great weight will be allowed to what is properly sworn in the answer.[1] But whether, in a bill to reform a written instrument, and in the absence of any allegation or charge of fraud, and on the ground of accident and mistake alone, verbal evidence is admissible to prove a distinct and independent agreement, not mentioned or alluded to in the written instrument, to do something further than is there stated, and *which the Statute of Frauds requires to be proved by writing*, is a point involved in no little doubt, by the decided cases. In those which have fallen under the author's notice, the evidence has been held admissible, in cases not within the statute;[2] but in regard to those to which the statute applies, the decisions in England are not uniform, neither are those in the United States; but the weight of modern opinions in the former country seems opposed to the admission of parol evidence, and in this country is in its favor.[3] It is, however, universally agreed,

[1] Ibid. And see Gillespie *v.* Moon, 2 Johns. Ch. 585, 600, where this point was considered, and the authorities reviewed. See also Townsend *v.* Stangroom, 6 Ves. 328; Shelburne *v.* Inchiquin, 1 Bro. Ch. C. 338, 341; Barstow *v.* Kilvington, 5 Ves. 593; Newson *v.* Bufferlow, 1 Dev. Ch. R. 379; Inskoe *v.* Proctor, 6 Monr. 311. Where the mistake alleged in the bill is admitted in the answer, but the answer sets up an agreement different from that alleged in the bill, parol evidence is admissible to prove what was the real agreement. Wells *v.* Hodge, 4 J. J. Marsh. 120. How far a Court of Equity ought to be active in granting relief by a *specific performance*, in favor of a party seeking, first, to reform the contract by parol evidence, and then, in the same bill, to obtain performance of it as thus reformed, is a point upon which learned Judges have held different opinions. The English Judges have, on various occasions, refused to grant the relief prayed for under such circumstances; and at other times have expressed strong opinions against it. But in this country, as will be seen in the note below, the weight of opinion is in favor of granting the relief; and it has accordingly been granted. Gillespie *v.* Moon, *supra*; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Bellows *v.* Stone, 14 N. Hamp. 175. And see 1 Story, Eq. Jur. § 161; *Ante*, Vol. 1, § 296 *a*; Wooden *v.* Haviland, 18 Conn. 101.

[2] Baker *v.* Paine, 1 Ves. 456, was an agreement for the sale of goods, between vendor and purchaser. And see Bellows *v.* Stone, 14 N. Hamp. 175; Wesley *v.* Thomas, 6 H. & J. 24.

[3] In the following English cases verbal evidence was admitted; namely, in Rogers *v.* Earl, 1 Dick. 294, to rectify a mistake of the solicitor, in drawing a marriage settlement; in Thomas *v.* Davis, Id. 301, to rectify a mistake in a conveyance, by the omission of one of the parcels of land intended to be conveyed; in Sims *v.* Urry, 1 Ch. Ca. 225, to prove a mistake in the penal sum of a bond, by writing it *forty* instead of *four hundred* pounds, for which latter sum the heir of the obligor was accordingly charged.

But such evidence was rejected, or held inadmissible, in Harwood *v.* Wallis, cited in 2 Ves. 195, where it was proposed to prove a mistake in drawing a marriage settlement, and thereby to exclude all the daughters of a second marriage; in Woollam *v.* Hearn, 7 Ves. 211, where it was proposed to prove a parol agreement for a lower rent than was inserted in the lease, which was for seventeen years; and in Att.-Gen. *v.* Sitwell, 1 Y. & C. 559, 582, 583, where it was attempted to show by parol evidence that, in a contract with the crown for the sale of the manor of Eckington, with the appurtenances, the advowson was omitted by mistake. [In this case, Baron Alderson, in delivering his judgment, said: "I cannot help feeling, that in the case of an executory agreement, first to reform and then to decree an execution of it, would be virtually to repeal the Statute of Frauds. The only ground on which I think the case could have been put, would have been that the answer contained an admission of

that the statute interposes no obstacle to relief against *fraud*, whether actual or constructive; and, therefore, Courts of Equity

the agreement as stated in the bill; and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law, where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case, it would seem as if, the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider, whether according to the dicta of many venerable Judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass. But in my present view of the question, it seems to me that the Court ought not, in any case, where the mistake is denied, or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement."]

In the following American cases, also, verbal evidence, in cases within the Statute of Frauds, was held inadmissible: Dwight *v.* Pomeroy, 17 Mass. 303, where the plaintiff, being a creditor of an insolvent debtor, who had executed a deed of assignment in trust for the benefit of his creditors, filed his bill against the trustees to reform an alleged mistake in the trusts expressed in the deed. So, in Elder *v.* Elder, 1 Fairf. 80, where the written agreement was for the conveyance of a "lot of land in Windham, formerly owned by J. E.," and the plaintiff proposed to prove by parol that it was intended to include the adjoining land in Westbrook, under the same ownership, but that this was omitted by mistake. In Osborn *v.* Phelps, 19 Conn. 63, an agreement for the sale of lands was drawn in two separate instruments; one to be signed by the vendor, and the other by the purchaser, and neither of the instruments containing any reference to the other; but each was signed by the wrong party by mistake, which the plaintiff sought to prove by parol evidence, but the Court (Ellsworth, J., *strenuè dissentiente*) held it inadmissible.

But in other American cases such evidence, upon great consideration, has been held admissible. The principal of these is Gillespie *v.* Moon, 2 Johns. Ch. 585, which was a bill for relief, and for the reconveyance of a parcel of land, which had been included, by mistake or fraud, in a deed of conveyance; and upon general grounds, after a review of the cases by the learned Chancellor Kent, verbal evidence of the mistake was admitted, and a reconveyance decreed. So in Tilton *v.* Tilton, 9 N. Hamp. 385, where tenants in common agreed to make partition pursuant to a verbal award, and executed deeds accordingly; but in the deed to the plaintiff a parcel assigned to him was omitted by mistake, and, in a bill for relief, verbal evidence of the mistake was held admissible, and relief thereupon decreed. So, in Langdon *v.* Keith, 9 Verm. 299, where, upon the transfer of a part only of several promissory notes secured by mortgage, an assignment of the mortgagee's entire interest in the mortgage was made by mistake, instead of a part; and relief was decreed, upon the like proof. So, in De Reimer *v.* Cantillon, 4 Johns, Ch. 85, where a portion of the land purchased at a sheriff's sale was, by mistake, omitted in his deed to the purchaser; and, upon parol evidence of the fact, the judgment debtors were decreed to convey to the purchaser the omitted parcel. And see Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; 1 Story, Eq. Jur. § 161, and notes; Hogan *v.* Del. Ins. Co., 1 Wash. C. C. R. 422; Smith *v.* Chapman, 4 Conn. 344; Watson *v.* Wells, 5 Conn. 468; Chamberlain *v.* Thompson, 10 Conn. 243; Wooden *v.* Haviland, 18 Conn. 101.

In several cases the evidence, upon which the mistake was corrected, was partly verbal and partly in writing, the former being admitted without objection. See Exeter *v.* Exeter, 3 My. & Cr. 321; Shipp *v.* Swann, 2 Bibb, 82.

In others, usually cited upon the point in question, the evidence was in letters, or other writings, signed by the party in whose favor the mistake was made. See Randall *v.* Randall, 2 P. Wms. 464; Barstow *v.* Kilvington, 5 Ves. 593; Bedford *v.* Abercorn, 1 My. & Cr. 312; Jalabert *v.* Chandos, 1 Eden, 372; Pritchard *v.* Quinchant, Ambl. 147.

In other cases, also, frequently cited in this connection, the bill sought a specific performance of the contract as it was written; in which case, as the Court is not bound to decree a performance unless the plaintiff is equitably entitled to it, under all the circumstances, it is everywhere agreed that verbal evidence is admissible, on the part of the defendant, to show that the writing does not express the real intent of the parties. See Rich *v.* Jackson, 4 Bro. Ch. C. 514; 6 Ves. 334, n.; Clark *v.* Grant, 14 Ves. 519; Higginson *v.* Clowes, 15 Ves. 516; Clinan *v.* Cooke, 1 Sch. & Lefr. 22. [In Wood *v.* Midgley, 27 Eng.

have always unhesitatingly relieved parties against deeds and other instruments, which have been *fraudulently* made to express more or less than was intended by the party seeking relief. It is difficult to perceive any moral or equitable distinction between a fraud previously conceived, and afterwards consummated in the execution of the instrument, and a fraud subsequently conceived, and attempted to be consummated by an iniquitous literal adherence to the terms of an instrument, which, by accident or mistake, does not express what was intended. Nor is it easy to discern any substantial reason why Equity should not treat both as alike fraudulent, and relieve, on the same principle, as well against the one as against the other. Surely there can be no moral difference between cheating another by purposely betraying him into a mistake, and cheating him by taking advantage of a mistake already accidentally made.

§ 364. Parol evidence is also admitted in Equity, to prove that a deed of conveyance, made *absolute* by mistake or accident, was *intended only as a mortgage*. This evidence has always been admitted in bills to redeem, in which mode the point usually occurs; but the principle of admissibility is applied to other cases of mistake and accident, as well as of fraud, wherever justice and equity require its application.[1] Such evidence is also admitted to prove a *parol agency* for the purchase of lands, in order to raise a trust for the benefit of the principal, where the agent has purchased and taken the conveyance in his own name.[2] So, in a bill to reform a bond, and for relief, parol evidence is admissible to prove that the bond, made joint by mistake, was intended to be joint and several; or that the name of the wrong person was inserted as obligee.[3]

Law & Eq. Rep. 206, the bill averred that the defendant entered into an agreement to purchase an estate, the terms of which were to be reduced to writing, and signed by the parties the next morning. The bill also alleged that the defendant paid fifty pounds as a deposit, and took a receipt, but that he had refused to complete the purchase, and had never signed the agreement. The plaintiff prayed for a specific performance. The defendant demurred to the bill on the ground that the case came within the Statute of Frauds, and the objection was sustained.]

[1] Strong *v.* Stuart, 4 Johns. Ch. 167; Joynes *v.* Statham, 3 Atk. 389; 1 Pow. on Mortg. 120, 151 (Rand's ed.); Washburn *v.* Merrills, 1 Day, 139; Slee *v.* Manhatten Co., 1 Paige, 48; Marks *v.* Pell, 1 Johns. Ch. 395. And see 2 Cruise's Dig. tit. 15, ch. 1, § 11, n. 1 (Greenleaf's ed.); James *v.* Johnson, 6 Johns. Ch. 417; Henry *v.* Davis, 7 Johns. 40; Clark *v.* Henry, 2 Cowen. 324; Whittick *v.* Kane, 1 Paige, 202; Irnham *v.* Child, 1 Bro. Ch. C. 92, and cases in Perkins's notes; 2 Story, Eq. Jur. §§ 768, 1018.

[2] Jenkins *v.* Eldredge, 3 Story, R. 181, 285, 292, 293; Morris *v.* Nixon, 1 How. S. C. R. 118; 17 Pet. 109, S. C.

[3] Wiser *v.* Blachly, 1 Johns Ch. 607; 1 Story, Eq. Jur. § 164. [See also United States *v.* Price, 9 How. U. S. 83; Weaver *v.* Shryock, 6 Serg. & R. 262; Stiles *v.*

§ 365. In cases of *trusts*, it has already been stated that the Statute of Frauds requires that they be proved by some writing, but that this relates only to express trusts, intentionally created by the parties, and not to *resulting* and *implied trusts*, arising out of collateral facts. Such facts, therefore, may be proved by parol evidence.[1] And though they go to contradict the terms of a deed, yet if they also go to prove fraud, parol evidence is admissible, in order to "force a trust upon the conscience of the party."[2] And irrespective of any allegation of fraud, it has been settled, upon great consideration, that parol evidence is admissible to prove that the purchase-money for an estate was paid by a third person, other than the grantee named in the deed, in order to establish a trust in favor of him who paid the money.[3] It is also admissible to charge a trust upon an executor, or a devisee, who has *prevented* the testator from making *provision in his will* for the plaintiff, by expressly and verbally undertaking with the testator, to fulfil his wishes in that respect,[4] or by fraudulently inducing him to make a new will without such provision,[5] or the like; the will thus procured being in favor of the defendant, as executor, devisee, or legatee. And in some cases of *trusts imperfectly expressed*, parol evidence has been held admissible in explanation of the intent. Thus, where a testator devised his estate to his wife, "having a perfect confidence that she will act up to *those views which I have communicated to her*, in the ultimate disposal of my property after her decease"; the wife afterwards died intestate; and a bill was filed by his two natural children for relief, against his heir and next of kin, and her heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the

Brock, 1 Penn. St. 115; Moser *v.* Libenquette, 2 Rawle, 428; Jones *v.* Beach, 2 De G., M. & Gord. 886.]

[1] *Ante*, Vol. 1, § 266. [In Cook *v.* Fountain, 3 Swanst. R. 585, Lord Nottingham said: "There is one good, general, infallible rule, that goes to both these kinds of trusts. (He had included all trusts in two kinds, — express or implied.) It is such a general rule as never deceives; a general rule to which there is no exception; and that is this: the law never implies, the Court never presumes, a trust but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so at last every case in Court will become *casus pro amico*." Judge Story thinks this is stating the doctrine a little too strong. 2 Story, Eq. Jur. § 1195.

[2] 2 Story, Eq. Jur. § 1195.

[3] See Boyd *v.* McLean, 1 Johns. Ch. 582, where the cases on this point are collected and reviewed by Kent, Ch. See also Botsford *v.* Burr, 2 Johns. Ch. 405; 2 Story, Eq. Jur. § 1201, n.; Pillsbury *v.* Pillsbury, 5 Shepl. 107; Runnels *v.* Jackson, 1 How. 358; 1 Spence, Eq. Jur. Chan. [571].

[4] Oldham *v.* Litchfield, 2 Vern. 506. And see Reech *v.* Kennigate, Ambl. 67; Drakeford *v.* Wilks, 3 Atk. 539.

[5] Thynn *v.* Thynn, 1 Vern. 296. See also 2 Story, Eq. Jur. § 781.

whole of his estate, after her death, to the plaintiffs, and that she promised so to do; parol evidence was admitted in proof of this allegation.[1]

§ 366. In certain cases of *presumptions of law*, also, parol evidence is admitted in equity to rebut them. But here a distinction is to be observed between those presumptions which constitute the settled legal *rules of construction* of instruments, or, in other words, *conclusive presumptions*, where the construction is *in favor of the instrument*, by giving to the language its plain and literal effect; and those presumptions which are raised *against the instrument*, imputing to the language, *primâ facie*, a meaning different from its literal import. In the latter class of cases, parol evidence is admissible to rebut the presumption, and give full effect to the language of the instrument; but in the former class, where the law conclusively determines the construction, parol evidence is not admissible to contradict or avoid it. Thus, where the same *specific thing* is given twice to the same legatee, in the same will, or in the will and again in a codicil, and where two *pecuniary* legacies of *equal* amount are given to the same legatee in one and the same instrument, the second legacy in each case is presumed to be a mere repetition of the first; but as this presumption is against the language of the will, parol evidence is admissible, where the subject is capable of such proof, to show that the second bequest was intended to be additional to the first. Such would be the case, where the bequests were of sums of money, or of things of which the testator had several; as, for example, one of his horses, without a particular specification of the animal.[2] But where two legacies of quantities *unequal* in amount, are given to the same person by the same instrument, or where two legacies are given, *simpliciter*, to the same person by *different* instruments, whether the amounts or quantities in the latter case be equal or unequal, the law conclusively presumes the second bequest to be additional to the first; and this construction being in favor of the language of the instrument, by a positive rule of law, parol evidence will not be admitted to control it.[3] The rule, in short, amounts to

[1] Podmore *v.* Gunning, 7 Sim. 644; 5 Sim. 485, S. C. [Dyer *v.* Dyer, 2 Cox, R. 92.]

[2] 1 Spence, Eq. Jur. Chan. p. [566]; Coote *v.* Boyd, 2 Bro. C. C. 521, 527, 528, per Ld. Thurlow; as expounded by Ld. Alvanley, in Osborne *v.* D. of Leeds, 5 Ves. 368, 380, and by Sir E. Sugden, in Hall *v.* Hill, 1 Con. & Law. 149, 150.

[3] Ibid. And see Hooley *v.* Hatton, 1 Bro. C. C. 390, n.; Foy *v.* Foy, 1 Cox, 163; Baillie *v.* Butterfield, Id. 392; Hurst *v.* Beach, 5 Madd. 351; Hall *v.* Hill, 1 Con. & Law. 120, 138, 156; 1 Dru. &

this; that parol evidence is *not* admissible to *prove* that the party did not mean what he has said; but that, when the law *presumes* that he did not so mean, parol evidence *is* admissible to prove that he did, by rebutting that presumption; it not being conclusive, but disputable. And the rule is applied, not only to cases purely testamentary, but to cases where there was first a will and then an advancement,[1] or first a debt, and then a will,[2] as well as to others.

§ 367. The parol evidence mentioned in the preceding section, as inadmissible, refers to the *verbal declarations* of the party.[3] In both classes of the cases referred to, parol evidence is clearly admissible to show any *collateral facts* relating to the party, such as his family, fortune, relatives, situation, and the like, from which the meaning of the instrument in question can be collected.[4] And where the language is clear, and there is no presumption of law to the contrary, yet the question of intent remains to be collected from the entire instrument; and two bequests in the same will may be ascertained to be either cumulative or substitutionary, according to the *internal evidence* of intention thus collected.[5]

§ 368. *Fourthly*, as to the objection, that the *witness is incompetent to testify* in the cause. The competency of the *parties* in a suit in equity, as witnesses, and the mode of obtaining their testimony having already been considered,[6] it remains only to speak of the competency of other witnesses. On this point, the general rule in equity is the same as at law, witnesses being held incompetent in both courts, by reason of deficiency in understanding, deficiency in religious principle, infamy, or interest.[7] A slight diversity of practice, in the mode of taking the objection, will alone require a brief notice in this place.

§ 369. In proceedings at law, an objection to the competency of a witness may be taken in any stage of the cause, previous to

War. 94, S. C.; Lee *v.* Paine, 4 Hare, 201, 216; Brown *v.* Selwin, Cas. temp. Talbot, 240.

[1] Roswell *v.* Bennett, 3 Atk. 77; Bigleston *v.* Grubb, 2 Atk. 48; Monck *v.* Monck, 1 Ball & B. 298; Shudal *v.* Jekyll, 2 Atk. 515.

[2] Fowler *v.* Fowler, 3 P. Wms. 353; Wallace *v.* Pomfret, 11 Ves. 542. The cases on this subject are reviewed, and the whole doctrine is fully and ably discussed by Lord Chancellor Sugden, in Hall *v.* Hill, *supra*.

[3] See *ante*, Vol. 1, §§ 289, 296; Guy *v.* Sharpe, 1 My. & K. 589.

[4] Ibid. The "circumstances of the case," which Chancellor Kent held admissible, in Dewitt *v.* Yates, 10 Johns. 156, undoubtedly were the collateral facts here alluded to, since he refers to no others, in delivering his judgment.

[5] Russell *v.* Dickson, 2 Dru. & War. 133, is an example of this kind.

[6] *Supra*, §§ 313 - 318.

[7] See *ante*, Vol. 1, §§ 365 - 430.

its being committed to the jury, provided it be taken as soon as the ground of it is known to the party objecting.[1] The same rule applies to examinations *vivâ voce* in equity. But where the testimony is taken by depositions, the practice is somewhat varied. The ancient forms of interrogatories included a question whether the witness was or was not interested in the event of the suit; but the more modern practice, when ground of incompetency is suspected, is to file a cross-interrogatory. And though the modern rule is, that the proper time for examination to *competency* is *before* publication, interrogatories to *credit* alone being allowed *after* publication;[2] yet, where an objection to the competency is discovered by the party *after publication*, it may be taken, even at the hearing, if it be taken as soon as it is discovered, and before the deposition is read.[3] And this is done, not by exhibiting articles, as in the ordinary case of discrediting a witness, but by motion for leave to examine as to the point of competency, upon affidavit of previous ignorance of the fact.[4] If the witness has been cross-examined *after* he was known by the party to be incompetent, this is a waiver of the objection;[5] and the burden of proof seems to be on the objector, to show that, at the time of the examination, he had *not* a knowledge of the existence of the ground of objection to his competency.[6]

[1] *Ante*, Vol. 1, § 421.

[2] Callaghan *v.* Rochfort, 3 Atk. 643; Purcell *v.* McNamara, 8 Ves. 324; Mills *v.* Mills, 12 Ves. 406; Perigal *v.* Nicholson, Wightw 63; Vaughan *v.* Worrall, 2 Swanst. 395, 398, 399. Where a *party* is examined as a witness between the parties in a suit, subject to all just exceptions, an objection to his testimony may be taken at the hearing. Mohawk Bank *v.* Atwater, 2 Paige, 60.

[3] Callaghan *v.* Rochfort, 3 Atk. 643; Needham *v.* Smith, 2 Vern. 463. And see Stokes *v.* M'Kerral, 3 Bro. Ch. C. 228; Rogers *v.* Dibble, 3 Paige, 238. So, if the ground of objection appears from the deposition itself, it may be taken at the hearing, before the deposition is read. Perigal *v.* Nicholson, *supra*.

[4] Callaghan *v.* Rochfort, *supra*.

[5] *Ante*, Vol. 1, § 421; *Supra*, § 350, note.

[6] Vaughan *v.* Worrall, 2 Swanst. 400, per Lord Eldon. And see Fenton *v.* Hughes, 7 Ves. 290.

# CHAPTER IV.

## OF THE WEIGHT AND EFFECT OF EVIDENCE.

[* § 370. Answer as an admission of defendant.
371. Weight to be given to examination of parties, in taking account.
372. Accounting party may sometimes discharge himself, upon his own oath.
373. Greater weight given to facts admitted by parties than to evidence *aliunde*.
374. Facts admitted on belief of party only who is personally interested in knowing.
375. Testimony of witnesses, how weighed.
376. Using a portion of a conversation or correspondence gives a credit to the whole.
377. Witnesses shown to adverse party entitled to greater credit than those whose names are unknown until deposition is published.
378. Maxim, *Falsus in uno falsus in omnibus*, has a juster application in chancery than in law.
379. Effect of affidavits to be considered.
380, 381. Requisites of an affidavit.
382, 383. Who may take affidavits.
384. Effect given to affidavits chiefly in admitting them as a foundation for ulterior proceedings.
385. Full credit given to plaintiff's affidavit where it is required to support *ex parte* application for immediate relief.]

### 1. ADMISSIONS.

§ 370. In regard to the effect to be given to an *answer in chancery*, when read in evidence, we have seen that the rule in equity is somewhat different from the rule at law.[1] This diversity arises, not from a difference in the principles recognized in the two kinds of tribunals, but from their different modes of proceeding, and the different circumstances under which the answer is offered in evidence. In chancery, the plaintiff reads the admissions in the answer in the same cause, merely as *admissions in pleadings*, of facts which he therefore is under no necessity to prove. He is consequently only bound to read entire portions of such parts of the answer as he would refer to for that purpose; or, in other words,

[1] *Supra*, § 281.

the principal passage in question, and such others as are explanatory of it, or are essential to a perfect understanding of its meaning.[1] In other respects, and so far only as it is responsive to the bill, it is evidence in the cause. But when an answer in chancery is read in a court of law, it is read in a different cause, between other parties, or between the same individuals in another forum, and in another and different relation; and it is offered and regarded, not as a pleading, but as evidence of declarations and admissions of facts, previously made in another place, by the party against whom it is offered; and in this view, it comes within the principle of the rule respecting declarations and admissions in general, namely, that the whole must be taken together.[2] The distinction here adverted to is observed only in the cause in which the answer was given; for even in chancery, when the answer of a party in *another* cause is offered as evidence, the whole of it becomes admissible, like other documents made evidence in the cause.[3] Every part, however, is not legally entitled to equal credit, merely because the whole is admitted to be read; but each part of the statement receives such weight as, under all the circumstances, it may seem to deserve.

§ 371. In *taking an account*, before the master, the examination of the parties is entitled to peculiar weight and effect. For though, when one party is examined as a *witness* against another party, in the cause, he stands in the situation of any other witness, and may be cross-examined by the adverse party, but his testimony cannot be used in his own favor; yet, when he is examamined before a master, in relation to his own rights in the cause, the examination is in the nature of a bill of discovery; there can be no cross-examination by the counsel; and he cannot testify in his own favor, except so far as his answers may be responsive to the interrogatories propounded to him by the adverse party. To this extent, his answers are evidence in his own favor, on the same principle that the answer of a defendant, responsive to the bill, is evidence against the complainant. And any explanations, necessary to prevent any improper inference from his answer, will

[1] *Supra*, §§ 281, 284, 285.

[2] *Supra*, §§ 281, 290; *Ante*, Vol. I, §§ 201, 202; Bartlett *v.* Gillard, 3 Russ. 156; Davis *v.* Spurling, 1 Russ. & My. 64; 2 Poth. Obl. by Evans, App. No. xvi. sec. 4, p. 137; Hart *v.* Ten Eyck, 2 Johns. Ch. 88-92. And see Mr. Emmett's argument in 1 Cowen, 744, n., quoted with approbation by Marcy, J., in Forsyth *v.* Clark, 3 Wend. 643.

[3] Boardman *v.* Jackson, 2 Ball & Beat. 386; Hart *v.* Ten Eyck, *supra*.

be regarded as responsive to the interrogatory. The same effect is allowed to answers given upon an examination *vivâ voce*.[1]

§ 372. Where the *account is of long standing*, the court will sometimes give peculiar effect to the oath of the accounting party, by a special order, allowing him to discharge himself, on oath, of all such matters as he cannot prove by vouchers, by reason of their loss.[2] So, where one of several executors or trustees has divested himself of the assets or trust funds, by delivering them over to his co-executors or co-trustees, the court will, in a proper case, permit him to discharge himself by his own oath, instead of exhibiting interrogatories for the examination of the others.[3] But this is allowed only under special circumstances, and by special directions; without which the master will not be authorized to permit a party to discharge himself, by his own oath, from the sums proved to have come to his hands.[4] In the case, however, of small sums, under forty shillings, it is an old rule in chancery to permit an accounting party to discharge himself by his own oath, stating the particular circumstances of the payments,[5] and swearing positively to the fact, and not merely to his belief.[6]

§ 373. In considering the testimony in the cause, greater weight and effect is given to *facts admitted by the parties* than to

[1] Benson *v.* Le Roy, 1 Paige, 122. And see Armsby *v.* Wood, 1 Hopk. 229; Hollister *v.* Barkley, 11 N. Hamp. 501. And although it is well settled, that where a book or paper is produced by a party, from which he is charged, the same book or paper may be read by way of discharge; Darston *v.* Lord Oxford, 1 Eq. Cas. Abr. 10; Bayley *v.* Hill, Ib.; Boardman *v.* Jackson, 2 Ball & Beat. 382; Blount *v.* Burrow, 4 Bro. Ch. Cas. 75; 1 Ves. 546, S. C.; yet he will not be permitted to discharge himself by a separate affidavit; Ridgeway *v.* Darwin, 7 Ves. 404; nor by a separate and independent statement of fact in his examination, not responsive to any interrogatory. Higbee *v.* Bacon, 8 Pick. 484.

[2] Peyton *v.* Green, 1 Eq. Cas. Ab. 11; Holtscomb *v.* Rivers, 1 Ch. Cas. 127.

[3] Dines *v.* Scott, 1 Turn. & Russ. 358; 2 Dan. Ch. Pr. 1428, 1429 [*3d Amer. Ed. 1228, 1229].

[4] Ibid. It has been held sufficient for a servant or an apprentice, in answer to a bill for an account, to say in general, that whatever he received was by him received and laid out again by his master's orders. Potts *v.* Potts, 1 Vern. 207.

[5] 1 Eq. Cas. Abr. 11, pl. 13; Anon. 1 Vern. 283; Marshfield *v.* Weston, 2 Vern. 176; Remsen *v.* Remsen, 2 Johns. Ch. 501; O'Neil *v.* Hamill, 1 Hogan, 183. And see Wicherley *v.* Wicherley, 1 Vern. 470; 2 Dan. Ch. Pr. 1425 [*3d Amer. Ed. 1225]. In some of the United States, the same rule is adopted in trials at law, in the proof of charges by books of account, with the suppletory oath of the party. Union Bank *v.* Knapp, 3 Pick. 109; Dunn *v.* Whitney, 1 Fairf. 15; *Ante*, Vol. 1, § 118, n. In the settlement of administration accounts in the Probate Court, though the executor or administrator is bound to verify the account by his oath, yet he is not therefore a competent witness, upon his own motion, to support the items of account, except as to small charges under forty shillings. Bailey *v.* Blanchard, 12 Pick. 166. In *New York*, the same doctrine is recognized; but the sum is fixed by statute at twenty dollars. Williams *v.* Purdy, 6 Paige, 166.

[6] Robinson *v.* Cummings, 2 Atk. 410. [* Books of account kept by a trustee and her agents may be admitted as evidence of disbursements in reference to the trust estate, where the trustee could not produce strict vouchers. Cookes *v.* Cookes, 9 Jur. N. S. 843.]

evidence *aliunde;* and greater regard is due to solemn admissions *in judicio* than to admissions by the parties *en pais*. Admissions in the pleadings, and other solemn admissions *in judicio*, are likened to algebraic *formulæ*, or as substitutes for proof, to be received by the judge in order to facilitate the final decision of the cause; and are deemed more satisfactory than if found by a jury, and equally conclusive upon the parties.[1] The court, in such cases, will only require to be satisfied that the admission was understandingly and advisedly made, either in the pleadings, or in the cause, as a substitute for proof, and without fraud, in order to hold the parties conclusively to it; without permitting it to be retracted, except by consent, in any subsequent stage of the proceedings, or upon a rehearing of the cause. And whether made by the party in person, or made by his counsel, is immaterial; the remedy of the party being only against his counsel, except upon proof of fraud.[2] From admissions of this conclusive kind, the court will infer any other facts naturally deducible from them; and when the facts thus inferred are so necessarily connected with the facts admitted, that, if disproved, the admissions would thereby be nullified, the evidence offered to disprove them will be rejected. Thus, if it be admitted that a certain woman is a *widow* of an individual named, their marriage and his death are also facts which the court would conclusively infer. And if the admission of fact be made in the defendant's answer, but the fact thus legally to be inferred from it be expressly denied in the answer, the admission will be acted upon by the court, notwithstanding the denial. Thus, where the case, as set forth in the answer, showed that the plaintiff had an interest in the subject of controversy, the defendant was ordered to pay money into court upon the strength of that admission, notwithstanding the denial of such interest in the answer.[3] So where a bill was filed for the specific performance of an agreement to grant a lease, and also for an injunction to restrain an ejectment brought by the defendant against the plaintiff; and the answer admitted that, when the defendant let the plaintiff into possession of the premises, it was his own *expectation*, and

[1] *Ante*, Vol. 1, §§ 186, 205, 527 *d*.

[2] Bradish *v.* Gee, Ambl. 229. To a bill to have a jointure made up to a certain sum, according to a parol agreement before marriage, the defendant pleaded in bar that a settlement was made by a deed, subsequent to the parol agreement; and it was held, that the deed was conclusive evidence that in it all the precedent treaties and agreements were merged. Bellasis *v.* Benson, 1 Vern. 369.

[3] Domville *v.* Solly, 2 Russ. 372. And see Thomas *v.* Visitors, &c., 7 G. & J. 369.

probably that of the plaintiff, that the holding would last as long as the alleged term, but that neither party was bound; the court held the defendant bound by this admission of the agreement, and refused to dissolve the injunction.[1] And, on the principle under consideration, if the defendant puts in a plea in bar of the bill, and the plaintiff does not reply, but sets down the plea for argument, the matter of the plea will be conclusively taken for true.[2]

§ 374. Though the solemn admissions of parties are regarded as thus conclusive, and though facts admitted on *belief* only are ordinarily received as true, according to the maxim, that what the parties believe the court will believe; yet whether this rule is applicable to *admissions made by an executor or an administrator*, upon his belief in regard to the liabilities of his testator or intestate, is a point not perfectly clear. In one case, where a bill was filed by a creditor against an administrator, who, in his answer, stated that he *believed* the debt was due; though the Lord Chancellor was inclined to think this sufficient, yet both Mr. Fonblanque, of counsel with the plaintiff, and Mr. Richards, as *amicus curiæ*, doubted whether it was a sufficient foundation for a decree; and an interrogatory was therefore exhibited.[3] Belief of a party *personally interested in knowing*, seems to be that belief which is intended in the maxim.

### 2. TESTIMONY OF WITNESSES.

§ 375. In estimating the weight and effect to be given to the *testimony of witnesses*, there are no fixed rules of universal application; each case being determined by the judge, in his discretion, according to its own circumstances. Yet it has been judicially said, that, where a witness against the moral conduct of another is under a necessity of first exculpating himself, no regard ought to be given to his evidence;[4] that the positive testimony of one credible witness to a fact is entitled to more weight than that of several others who testify negatively, or, at most, to collateral circumstances, merely persuasive in their character;[5] and that the testimony of a willing and uncorroborated witness, who merely states his understanding of a conversation between the parties, is entitled to no weight.[6] If a witness swears that he never heard of

[1] Atwood *v.* Barham, 2 Russ. 186. And see Gresley, Eq. Evid. 459, 460.
[2] Gallagher *v.* Roberts, 1 Wash. C. C. R. 320.
[3] Hill *v.* Binney, 6 Ves. 738.
[4] Watkyns *v.* Watkyns, 2 Atk. 97.
[5] Kennedy *v.* Kennedy, 2 Ala. 571; Todd *v.* Hardie, 5 Ala. 698; Littlefield *v.* Clark, 3 Desaus. 165.
[6] Powell *v.* Swan, 5 Dana, 1.

a certain transaction at or before a certain time, this is regarded as a negative pregnant that he did hear of it after that time.[1] So, an affirmation by a vendor that he did not recollect his having authorized a person to sign his name to a covenant for title, will not be deemed either a denial of such authority, or a disbelief that it was actually given; and further proof of such authority will not be required, if the owner knew of the sale and acquiesced in it.[2]

§ 376. It is a general rule, applicable not only to evidence of *conversations* or *declarations*, but to correspondence on a particular subject, that if a party makes use of a portion of a conversation or correspondence, he thereby gives credit to the whole, and authorizes the adverse party to use at his pleasure any other portion that relates to the same subject. But it does not follow that the court is bound, therefore, to give to every part of such evidence equal credit and weight; nor, on the other hand, will it be treated as an absolute nullity; but if it be not entirely neutralized by opposing evidence, such weight will be attributed to it as on the whole it may deserve.[3]

§ 377. It is obvious, also, to remark, that frequently a higher degree of credit is due to the testimony of witnesses who have either been *shown to the adverse party* previous to their examination, according to the ancient course in chancery, or *sworn in open court*, in presence of the proctor on the other side, according to the practice in the Ecclesiastical Courts, than to that of witnesses whose names were unknown to the adverse party until their depositions were published. For in the former case the party had ample opportunity to ascertain the character of the witness, and to impeach it if unworthy of credit, while in the latter this was impossible. Yet here, also, no inflexible rule can be laid down, each case being chiefly governed by its own circumstances.

§ 378. The maxim, *Falsus in uno falsus in omnibus*, has a juster application to witnesses in chancery than in the courts of common law. For in the latter tribunals the witness is not only examined orally, but is subjected to a severe and rapid cross-examination,

[1] Walker *v.* Walker, 2 Atk. 100.

[2] Talbot *v.* Sibree, 1 Dana, 56.

[3] Gresley, Eq. Evid. 466; Bartlett *v.* Gillard, 3 Russ. 156. This rule is restricted in its application to matters relating to the portion already adduced in evidence. Hence the production of a letter-book, on the call of the plaintiff, in order to prove the sending of certain letters copied therein, does not entitle the defendant to read other letters in the same book, not referred to in those which have been called for. Sturge *v.* Buchanan, 10 Ad & El. 598. And see Prince *v.* Samo, 7 Ad. & El 627; Catt *v.* Howard, 3 Stark. R. 5; *Ante*, Vol. 1, § 467.

without sufficient time for reflection or for deliberate answers, and hence may often misrepresent facts, from infirmity of recollection or mistake; in which case, to apply the maxim *in extenso* to his testimony would be highly unjust. Yet such mistakes must, of necessity, detract something from the credit due to his accuracy, though he may not be chargeable with moral turpitude. But where, according to the course of chancery, the testimony of the witness is taken upon interrogatories in writing, deliberately propounded to him by the examiner, no other person being present; and where ample time is allowed for calm recollection, and any mistakes in his first answers may be corrected at the close of the examination, when the whole is distinctly read over to him; there is ground to presume that a false statement of fact is the result either of bad design or of gross ignorance of the truth, and culpable recklessness of assertion; in either of which cases all confidence in his testimony must be lost, or at least essentially impaired. If the statement is deliberately and knowingly false in a single particular, the credibility of the whole is destroyed; but if it is erroneous without a fraudulent design, the credibility is impaired only in proportion as the cause of the error may be chargeable to the witness himself.[1]

### 3. AFFIDAVITS.

§ 379. The effect of judicial documents having been considered in a former volume, it only remains to take notice of the nature, admissibility, and effect of *affidavits*, in cases peculiar to proceedings in chancery.

§ 380. An affidavit is "a declaration, on oath or affirmation, taken before some person having competent and lawful power to administer the same."[2] It is essential to public justice that an affidavit be so taken as that, if false, the affiant may be indicted

[1] The maxim, though variously expressed by the civilians, has reference not only to falsehood deliberately perpetrated in writings, but to mere mistakes in an oral examination. Qui in uno, imo in pluribus, minus vera *scripserit*, in cæteris credendum ei non est. Menoch. Concil. 1, n. 300. Falsum præsumatur commisisse, qui semel *falsarius* fuit. Id. Concil. 422, n. 125. Falsum dictum, à testibus in uno, et in aliqua parte sui examinis, totum examen reddat falsum, nec probat; Mascard. De Probationibus, Concl. 744, n. 1; etiamsi testis ignoranter in una parte deposuisset falsum; quia tunc totum examen censetur falsum, et non probat. Nam testis non debet deponere, nisi id quod novit, vel vidit; et in hoc non potest prætendere ignorantiam. Id. n. 7.

[2] 3 Dan. Ch. Pr. 1769 [*3d Amer. Ed. 1681]; Hind. Ch. Pr. 451. [For the opinion of Mr. Vice-Chancellor Knight Bruce on the relative value of evidence given by affidavit and by depositions taken on written interrogatories, and on the use of cross-examination, see Attorney-General *v.* Carrington, 3 Eng. Law and Eq. R. 73 (4 De G. & S. 140).] [* A bill cannot be read as an affidavit on a final hearing of a cause. Airs *v.* Billop, 4 Jones, Eq. 17.]

and punished for perjury; and to this end the rules of practice respecting the form and requisities of affidavits are constructed. It is therefore generally required in chancery, that a *cause be first pending*, in which the affidavit is to be used; and hence, if it be taken before the bill is actually filed, it cannot be read, but will be treated as a nullity.[1] It is sufficient that it be *in terms so positive and explicit* as that perjury may be assigned upon it.[2] It must be *properly entitled;* for an affidavit, made in one cause, cannot be read to obtain an order in another;[3] and an affidavit not properly entitled as of a cause pending, or otherwise appearing to have been legally taken, cannot, if false, be the foundation of an indictment for perjury.[4] But it is sufficient if it was correctly entitled when it was sworn, though the title of the cause may afterwards have been changed by amendment.[5] It is also sufficient, where there are several defendants, if it states the name of the first, adding, "and others," without naming them; if there be no other suit pending between the plaintiff and that defendant with others.[6] It is also proper, though not indispensably necessary, that the affidavit of any person, other than a party in the cause, should state the true place of residence and the addition, as well as the name of the affiant.

§ 381. The office of an affidavit is to bring to the court the knowledge of facts; and therefore it should be confined to *a statement of facts only*, as they *substantially* exist, with all *necessary circumstances* of time, place, manner, and other *material incidents*. It is improper to state conclusions of law, or legal propositions, such as, that a *legal service* was made, or *legal notice* given, without stating the manner; or that the party has a *good defence*, without stating the nature and grounds of it; but the affidavit should state particularly how the service was made or notice given, and what are the grounds and merits of his defence or claim, that the court may judge of the legality, and whether the defence or claim is well founded or merely imaginary; and that the party may be criminally proceeded against, if the statement be false.[7]

[1] Hughes *v.* Ryan, 1 Beat. 327; Anon. 6 Madd. 276; *Supra*, § 190.

[2] Coale *v.* Chase, 1 Bland, 137; *Supra*, § 194.

[3] Lumbrozo *v* White, 4 Dick. 150.

[4] Hawley *v.* Donelly, 8 Paige, 415. And see Stafford *v.* Brown, 4 Paige, 360; *Supra*, § 190.

[5] Hawes *v.* Bamford, 9 Sim. 653.

[6] White *v* Hess, 8 Paige, 544.

[7] Meach *v.* Chappel, 8 Paige, 135; Sea Ins. Co. *v.* Stebbins, Id. 563; 3 Dan. Ch. Pr. 1776 [*3d Amer. Ed. 1688]. And see Rucker *v.* Howard, 2 Bibb, 166; Davis *v.* Gray, 3 Lit. 451; Thayer *v.* Swift, Walk. Ch 219 (Michigan). [*Evidence

It must not state arguments, nor draw inferences, nor contain other irrelevant, impertinent, or scandalous matter; otherwise such matter will be expunged by the court, with or without reference to a master, and the party or solicitor will be punished in costs.[1]

§ 382. An affidavit must also be *sworn* before some person authorized by law to administer such oaths; and generally speaking, any person, authorized to take depositions or to examine witnesses in the cause, is qualified to take affidavits.[2] Under the laws of the United States, regulating the practice in the national tribunals, this authority is given to any judge of any court of the United States, any chancellor or judge of any superior court of a State, any judge of a county court or court of common pleas, or mayor or chief magistrate of any city in the United States, not being of counsel nor interested in the suit;[3] any of the commissioners appointed by the court to take acknowledgments of bail and affidavits; and any notary public.[4] And an affidavit, taken out of court, and not thus sworn, will not be permitted to be used.[5] Under the laws of the several States, affidavits to be read in the State courts may generally be taken before any judge of a court of record, or a justice of the peace. Regularly, an affidavit must not be sworn before on attorney or solicitor in the cause;[6] but in some States, this is no valid objection, if he is not the solicitor of record.[7]

§ 383. An affidavit may also be read in the State tribunals if *taken in another State* before any commissioner appointed to take acknowledgments and administer oaths under the authority of the State in which the court is holden; or before a master in chancery in such other State, though not such commissioner;[8] or taken

of belief only is admissible on interlocutory application, though not at the hearing of a cause; and the grounds of such belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be, but are not produced, and where the deponent swears that he disbelieves the statements made to him by such persons. Bird *v.* Lake, 1 H. & M. 111.]

[1] Powell *v.* Kane, 5 Paige, 265; 3 Dan. Ch. Pr. 1777 [*3d Amer. Ed. 1689]; Jobson *v.* Leighton, 1 Dick. 112; Phillips *v.* Mnilman, Id 113. But an affidavit will not be referred for mere impertinence, after an affidavit in answer to it has been filed. Burton, *In re*, 1 Russ 380; Chimelli *v.* Chauvet, 1 Younge, 384.

[2] See on this subject, *ante*, Vol. 1, §§ 322–324; *Supra*, §§ 251, 319.

[3] Stat. U. S. 1789, ch. 20, § 30; Vol. 1, p. 88.

[4] Stat. U. S. 1812, ch. 25; Vol. 2, p. 679; Stat. U. S. 1850, ch. 52.

[5] Haight *v.* Prop'rs Morris Aqueduct, 4 Wash. 601.

[6] Hogan, *In re*, 3 Atk. 813; Smith *v.* Woodroffe, 6 Price, 230; 9 Price, 478; 3 Dan. Ch. Pr. 1771 [*3d Amer. Ed 1682]; Wood *v.* Harper, 3 Beav. 290.

[7] The People *v.* Spaulding, 2 Paige, 326; McLaren *v.* Charrier, 5 Paige, 530.

[8] Allen *v.* The State Bank, 1 Dev. & Bat. 7.

under a commission issuing out of the court where the cause is pending; it being, in this case, taken under the authority of the court.[1] If it appears that an affidavit has been taken at a *place out of the jurisdiction* of the magistrate or other officer, it will not be received; but if the place does not appear, it will be presumed to have been properly taken.[2] Indeed, an affidavit taken out of the jurisdiction of the court will seldom be rejected, if it appears to have been duly sworn before a person authorized to administer such oaths, by the laws of the country of his residence; and it will be sufficient if the person be proved to have been at the time *de facto* in the ordinary exercise of the authority he assumes.[3] In all these cases, the liability of the affiant to an indictment for perjury does not seem to be much relied on, in considering the admissibility of the affidavit; but in many States provision is made by law for the punishment of false swearing in any deposition or affidavit taken under a commission from abroad.

§ 384. The *weight and effect* given to affidavits is chiefly in admitting them as a sufficient foundation for ulterior proceedings. Thus, where an affidavit, whether of the party, or of another person, is required in support of a motion or a petition or a plea, which is its proper use and office, it is ordinarily received for that purpose as conclusive evidence of the facts which it contains. The like effect is given to affidavits in inquiries before a master, wherever they are received, no affidavit in reply being read, except as to new matter, which may be stated in the affidavits in answer, and no further affidavits being read, unless specially required by the master.[4] They are also received, as satisfactory proof of exhibits at the hearing, in cases already mentioned.[5] So, in certain cases of fraudulent abstracting of the plaintiff's property by the defendant, we have seen that the amount of his damages, in the absence of other proof, may be ascertained by the affidavit of the

[1] Gibson *v.* Tilton, 1 Bland, 352.

[2] Parker *v.* Baker, 8 Paige, 428; Lambert *v.* Maris, Halst. Dig. p. 173.

[3] Pinkerton *v.* Barnsley Canal Co., 3 Y. & J. 277, n.; Ellis *v.* Sinclair, Id. 273; Ld. Kinnaird *v.* Saltoun, 1 Madd. R. 227; Garvey *v.* Hibbert, 1 J. & W. 180; 3 Dan. Ch. Pr. 1771–1773 [* 3d Amer. Ed. 1683]. But see Ramy *v.* Kirk, 9 Dana, 267, *contra*. The certificate of a notary public is not sufficient to prove the official character of the foreign magistrate. Hutcheon *v.* Mannington, 6 Ves. 823.

[4] Orders of April 3, 1828, Ord. 66; Law's Pract. U. S. Courts, p. 645. [* On the hearing of a motion, it is open to the counsel for the respondent to avail himself of any affidavit on behalf of his client which is filed at the time when he is called on to address the court. Munroe *v.* Wivenhoe and Brightlingsea Railway Co., 12 L. T. N. S. 562.]

[5] *Supra*, § 310.

plaintiff himself, to which, *in odium spoliatoris*, full credit will be given.[1] Conclusive effect is also given to the affidavit of the party in certain other cases, where it is required in verification of his statement, for the satisfaction of the court. Thus, to a bill of *interpleader*, it is requisite that the plaintiff should make affidavit that the bill is not filed in collusion with either of the defendants, but merely of his own accord, for his own particular relief.[2] So, in a bill for the examination of witnesses *de bene esse*, where, from their age or infirmity, or their intention of leaving the country, there is apprehended danger from the loss of their testimony, positive affidavit is required of the plaintiff, stating the reasons and particular circumstances of the danger, and the material facts to which the witness can testify; lest the bill be used as an instrument to retard the trial; and to this affidavit full credit is given.[3] If the affidavit is to the party's belief only, and does not state the grounds of his believing that the witness will so testify, or does not state that he is the only witness by whom the facts can be proved, it will not be sufficient.[4] So, where an *accidental loss* is the essential fact giving jurisdiction to the court, and on that ground the prayer of the bill is not only for discovery, but also for relief; the court will not assume jurisdiction upon the mere suggestion of the fact, but requires preliminary proof of it by the affidavit of the party, filed with the bill; and to this full credit is given, at least until it be overthrown by proof of the hearing. Such is the case of a bill for discovery and relief in Chancery, founded on the alleged *loss*,[5] or the *unlawful possession and concealment by the defendant* of an *instrument* upon which, if in the possession of the plaintiff, an action at law might be maintained by him against the defendant.[6] The reason of requiring such preliminary proof in these cases is, that

[1] *Supra*, § 344; *Ante*, Vol. 1, § 348.

[2] 3 Dan. Ch. Pr. 1761 [* 3d Amer. Ed. 1668], by Perkins; Story, Eq. Pl. §§ 291, 297; Bignold *v.* Audland, 11 Sim. 23. And see Langston *v.* Boylston, 2 Ves. 102, 103; Stevenson *v.* Anderson, 2 V. & B. 410. In *Connecticut*, this is not required. Jerome *v.* Jerome, 5 Conn. 352; Nash *v.* Smith, 6 Conn. 421, 426.

[3] 1 Dan. Ch. Pr. 452 [* 3d Amer. Ed. 394]; Story, Eq. Pl. § 309; Rules of Circuit Courts U. S. in Equity, Reg. 70; 2 Dan. Ch. Pr. 1117, 1118 [* 3d Amer. Ed. 956; Oldham *v.* Carleton, 4 Bro. C. C. 88; Laragoity *v.* Att.-Gen., 2 Price, 172; Mendizabel *v.* Machado, 2 Sim. & Stu. 483.

[4] Rowe *v.* ———, 13 Ves. 261.

[5] Walmsley *v.* Child, 2 Ves. 341, 344; Campbell *v.* Sheldon, 13 Pick. 8; Thornton *v.* Stewart, 7 Leigh, 128. In *Virginia*, an affidavit does not seem to be required. Cabel *v.* Megginson, 6 Munf. 202. If the proof is clear, both of the loss, and that the instrument, if negotiable, was not negotiated, nor payable to bearer, so that the defendant cannot by any possibility be exposed to pay it twice, the plaintiff may now recover at law. See *ante*, Vol. 2, § 156.

[6] Anon., 3 Atk. 17. And see Livingston, *v.* Livingston, 4 Johns. Ch. 297; Laight *v.* Morgan, 1 Johns. Cas. 429; Le Roy *v.* Veeder, Id. 417; 1 Dan. Ch. Pr. 449, 450 [* 3d Amer. Ed. 395].

the tendency of the bill is to transfer the jurisdiction from a court of law to a court of equity.

§ 385. Full weight and credit is also given to the plaintiff's affidavit, where it is required in order to support an *ex parte* application for some immediate relief, in cases which do not admit of delay. The affidavit in such case must be made either by the plaintiff himself, or, in his absence, by some person having certain knowledge of the facts;[1] and it must state the facts on which the application is grounded, positively and with particularity, and not upon information and belief only, nor in a general or a doubtful manner.[2] It must also state either an actual violation of his right by the defendant, or his apprehension and belief of imminent and remediless loss or damage, if the case be such, together with the facts on which his belief is grounded.[3] If the application be for an injunction to stay *waste*, or other irreparable mischief, the affidavit must state the plaintiff's actual and exclusive title to the land or premises, and the conduct of the defendant, actual or apprehended, in violation of his right.[4] If it be to restrain the *infringement of a patent*, he must swear to his present belief, at the time of taking the oath, that he is the original inventor;[5] or, if it be to restrain the infringement of a *copyright*, the bill being filed by an assignee, he must state facts showing the legality of the immediate assignment to himself.[6] In an application for a writ of *ne exeat regno*, the affidavit must be positive and direct, that a debt is due and payable; that it is certain and not contingent; that the plaintiff believes that the defendant actually intends to go out of the jurisdiction, and the reason which he has for believing so; and that the debt will thereby be endangered.[7] Nothing short of such directness and particularity will suffice; except that in matters of pure account, the plaintiff's belief as to the amount of the balance due to him is sufficient.[8] Similar strictness is required in affidavits in support of applications to restrain the transfer of

[1] 3 Dan. Ch. Pr. 1890 [*3d Amer. Ed. 1769]; Campbell *v.* Morrison, 7 Paige, 157; Lord Byron *v.* Johnston, 2 Meriv. 29.

[2] Ibid.; Field *v.* Jackson, 2 Dick. 599; Whitelegg *v.* Whitelegg, 1 Bro. C. C. 57, and note by Perkins; Storm *v.* Mann, 4 Johns. Ch. 21.

[3] 3 Dan. Ch. Pr. 1891.

[4] Hanson *v.* Gardiner, 7 Ves. 305; Jackson *v.* Cator, 5 Ves. 688; Eastburn *v.* Kirk, 1 Johns. Ch. 444.

[5] Hill *v.* Thompson, 3 Meriv. 624.

[6] 3 Dan. Ch. Pr. 1891 [*3d Amer. Ed. 1770].

[7] 2 Story, Eq. Jur. § 1474; Oldham *v.* Oldham, 7 Ves. 410; Etches *v.* Lance, Id. 417; 3 Dan. Ch. Pr. 1931, 1932 [*3d Amer. Ed. 1805; Rice *v.* Hale, 5 Cush. 241.]

[8] Rico *v.* Gualtier, 3 Atk. 501; Jackson *v.* Petrie, 10 Ves. 164; Hyde *v.* Whitfield, 19 Ves. 354.

negotiable securities, or of other property, or the payment of money, or the like. In these and all other cases, where the danger of remediless loss of damage is imminent, the court acts at once, upon the credit given to the plaintiff's affidavits alone; but in other cases decided upon affidavits, where no such necessity exists, they are ordinarily received on both sides, and weighed, like other evidence, according to their merits.

# PART VII.

OF

# EVIDENCE IN COURTS OF ADMIRALTY

AND

# MARITIME JURISDICTION.

# PART VII.

## OF EVIDENCE IN COURTS OF ADMIRALTY AND MARITIME JURISDICTION.

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## CHAPTER I.

### PRELIMINARY OBSERVATIONS.

[*§ 386. Jurisdiction of admiralty and maritime causes in United States confided originally to district courts.
387. Two classes of cases; one dependent upon locality, and the other upon the nature of the contract.
388. Forms of proceeding formerly according to civil law.
389. Acquisitions since made from canon law and Roman civil law.
390. Roman practice described.
391, 392. Interrogatory actions of the Roman law.
393. Positions and articles introduced into the libel.
394. Defendant answers libel; new facts presented in amendment of libel and answer.
395. Roman forms, basis of rules of practice in Instance courts of United States.
396. Requisites of libels of information.
397. Informations and libels may be amended in matters of form at any time.
398. In civil and maritime causes defendant's answer must be on oath.
399. Defendant may require personal answer of libellant upon oath to interrogatories.
400. Court may refer any matters to commissioners.
401. Causes in Roman law divided into plenary and summary.]

§ 386. The administration of the admiralty and maritime jurisprudence in the United States is confided originally and exclusively to the district courts.[1] From the final judgments and decrees of these courts in admiralty and maritime causes, where the value of the subject in dispute, exclusive of costs, exceeds

[1] U. S. Constitution, Art. 3, § 2; Stat. 1789, ch. 20, § 9, Vol. 1, p. 76.

fifty dollars, an appeal lies to the circuit court next to be holden in the same district;[1] and where the value exceeds two thousand dollars, an appeal from the final judgment or decree of the circuit court, in such causes, lies to the Supreme Court of the United States.[2] And in these appeals, as well as in equity causes, the evidence goes up with the cause, to the appellate tribunal, and therefore must be reduced to writing.[3] The district courts also take jurisdiction of certain causes at common law, the consideration of which is foreign to our present design.

§ 387. The general admiralty jurisdiction conferred by the constitution and laws of the United States is divisible into two great classes of cases; one dependent upon locality, the other upon the nature of the contract. The former includes acts and injuries done upon the sea, whether upon the high seas, or upon the coast of the sea, or elsewhere within the ebb and flow of the tide.[4] The latter

[1] U S. Stat. 1803, ch. 40 [93], § 2, Vol. 2, p. 244.

[2] U. S. Stat. 1803, ch. 40 [93], § 2, Vol. 2, p. 244.

[3] The Boston, 1 Sumn. 332; U. S. Stat. 1789, ch. 20, §§ 19, 30; Stat. 1803, ch. 93, § 2, Vol. 2, p. 244.

[4] [The admiralty jurisdiction of the United States courts now extends over all navigable waters. In the case of The Thomas Jefferson, 10 Wheat. 428, the Supreme Court decided that admiralty jurisdiction extended only to "waters within the ebb and flow of the tide." In subsequent cases it was decided that within this limit were included rivers whose waters rose and fell with the tide, whether the water was salt or fresh, and though they were within the body of a county. Peyroux *v.* Howard, 7 Pet. 324; Waring *v.* Clarke, 5 How. 441; Jackson *v.* Steamboat Magnolia, 20 How. 296. See also Steamboat Orleans *v.* Phœbus, 11 Pet. 175. But by act of Congress of 1845, ch. 20 (5 U. S. Stats. at Large, 726), admiralty jurisdiction was given to the District Court over coasting vessels of twenty tons burden and upward upon the lakes and navigable waters connecting the same. In the case of The Genesee Chief *v.* Fitzhugh, 12 How. 443, the question was raised whether Congress had power to pass such an act, and the Court decided that it had, on the ground that the admiralty and maritime jurisdiction extended *over all navigable waters*, whether within the ebb and flow of the tide or not; and that Congress consequently had power to confer this new jurisdiction on the District Court under the provision in the Constitution that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction" Under these views of the law on this subject a large admiralty practice has grown up on the great inland lakes and navigable rivers of the United States. [* Under the act of Congress of 1845, a State court has not concurrent jurisdiction with the admiralty courts of the United States of maritime torts, on navigable rivers, where one of the parties is a steamer or other vessel employed in the commerce or the navigation of such river. The Hine *v.* Trevor, 4 Wallace, U. S. R. 555. See also Brightly's Digest, title "Admiralty," and cases cited.]

But though the jurisdiction of Admiralty has been so much extended, by the recent decisions of the Supreme Court, so far as it depends upon place, that tribunal has shown a disposition to restrict it so far as it depends on subject-matter. In Cutler *v.* Rae, 7 How. 729, a libel brought by the owner of a vessel which had been voluntarily stranded, against the owner of the cargo which had been saved and restored to him, for contribution to general averge, was dismissed by the Supreme Court on appeal for want of jurisdiction, although the point was not raised in the argument. The court held there was no lien for the general-average contribution after the cargo had been given up to the owner, and that the admiralty jurisdiction ceased with the lien.

In the case of People's Ferry Company *v.* Beers, 20 How. 393, the Supreme Court of the United States decided that the

includes contracts, claims, and services, purely maritime, and rights and duties appertaining to commerce and navigation. The former of these classes is again divided into two branches; the one embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations; the other embracing captures and questions of prize, arising *jure belli*.[1] The

builders of a vessel had no lien thereon for labor and materials which could be enforced in admiralty, and took the ground that a contract to build a ship or furnish materials for her construction was not maritime. In The Richard Busteed, 21 Law Reporter, 601, decided after the case in 20 How., Judge Sprague held that the latter case decided merely that such a contract gave no lien, and did not overrule the numerous decisions that the contract was maritime in its nature. Accordingly he held that, where a lien was given by the law of the State where the vessel was built, it might be enforced in the admiralty courts. But in the case of Roach *v.* Chapman, 22 How. 129, involving a question similar to that decided in The Richard Busteed, the Supreme Court held that such a contract was clearly not maritime, and that the lien created by the State law could not be enforced in admiralty. And see the next note as to the jurisdiction over policies of insurance. See also Taylor *v.* Carryl, 20 How. 583; Grant *v.* Poillon, Ib. 162.]

[* In The Plymouth, 3 Wallace U. S. R. 20, it is held that where a vessel lying at a wharf on waters subject to admiralty jurisdiction took fire, and the fire, spreading itself to certain storehouses on the wharf, consumed these and their stores, it is not a case for admiralty proceeding. Nelson, J., says: "It will be observed that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on the land. It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends upon locality, — the high seas, or other navigable waters within admiralty cognizance; and being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark. . . . . But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possesses jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of materialmen, for supplies, charter parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have at most but a very remote resemblance. They are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship, and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel, — on the high seas or navigable waters, — and the injury complete within admiralty cognizance. It was the tortious acts on board the vessel to which the jurisdiction attached. This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damage, in technical language, whatever else attended it, must have been there complete."]

[1] 3 Story on the Constitution, § 1662. The subject of admiralty jurisdiction, as it does not directly affect the principles of the law of evidence, is deemed foreign from the plan of this work, and therefore is only incidentally mentioned. It is well known that in the United States this jurisdiction is asserted and actually maintained in practice more broadly than in England. The history and grounds of this difference, and the true nature, extent,

cognizance of all these, except the last, belongs to the *Instance side* of the court, or what is elsewhere termed the *Instance court* of admiralty; and that of the latter, or prize causes, belongs to the *Prize court*. In England, a distinction is made between these two, they being regarded as separate courts; the former being the ordinary and appropriate court of admiralty, proceeding according to the civil and maritime law, from whose decrees an appeal lies to the Delegates; and the latter proceeding according to the course of admiralty and the law of nations, with an appeal to the Lords Commissioners of Appeals in Prize Causes. But in this country these two jurisdictions are consolidated and vested in the district courts, though the jurisdiction of prize is dormant, until called into activity by the occurrence of war.[1]

§ 388. In the infancy of this court, under the present national Constitution, it was required by statute[2] that "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the *civil law*." By a subsequent statute[3] it was provided, that "the forms and

and limit of the admiralty jurisdiction, as recognized in the constitution and laws of the United States, have been expounded with masterly force of reasoning and affluence of learning, by Mr. Justice Story, in 1815, in the leading case of De Lovio *v.* Boit, 2 Gall. 398–476; and by Judge Ware, in The Huntress, Davcis, R. 93–111. Other cases on this subject are mentioned, and a concise summary of the discussion is given in 1 Kent, Comm. 365–380, and notes, to which the student is referred. See also Curtis on Merchant Seamen, pp. 342–367. [* See as to charter-parties and contracts of affreightment New Jersey Steamboat Company *v.* Merchants' Bank of Boston, 6 How. U. S. R. 334; and Morewood *v.* Enequist, 23 Ib. 493.] The jurisdiction, as asserted in De Lovio *v.* Boit, includes, among other things, charter-parties and affreightments; marine hypothecations and bottomries; contracts of material-men; seamen's wages; contracts between part-owners; averages, contributions, and jettisons; and policies of insurance. To these may be added salvage; marine torts; damages and trespasses; assaults and batteries on the high seas; seizures under the revenue and navigation laws, and the laws prohibitory of the slave-trade; ransom; pilotage; and surveys. The jurisdiction of the admiralty over policies of insurance was reaffirmed by Mr. Justice Story in 1822, in Peele *v.* The Merchants' Ins. Co., 3 Mason, 28; and again in 1842, in Hale *v.* The Washington Ins. Co., 2 Story, R. 182; and is understood to have been approved by Marshall, C. J., and Mr. Just. Washington; Id. 183; 1 Brock. R. 380; though denied by Mr. Just. Johnson, in 12 Wheat. 638. [In Gloucester Ins. Co. *v.* Younger, 2 Curtis, C. C. 322, Mr. Justice Curtis affirmed the jurisdiction of the Court in such cases, as settled by the previous decisions in his circuit, but declined to give his own opinion. The question has not yet been passed upon in the Supreme Court of the United States, but it seems to be understood that the jurisdiction will be denied whenever the question arises. See the opinion of Curtis, J., in the case just cited. See also the remarks of Taney, C. J., in Taylor *v.* Carryl, 20 How. 583.] [* The court has jurisdiction of all proceedings consequent upon the judgment to obtain satisfaction. Campbell *v.* Hadley, Sprague's Decisions, 470.]

[1] 1 Kent, Comm. 353–355; Jennings *v.* Carson, 1 Pet. Adm. R. 1; 4 Cranch, 2, S. C.; Glass *v.* Sloop Betsey, 3 Dall. 6, 16. The jurisdiction of prize causes was afterwards expressly vested in the District Courts by Stat. 1812, ch. 107, § 6, Vol. 2, p. 761.

[2] U. S. Stat. 1789, ch. 21, § 2, Vol. 1, p. 93.

[3] U. S. Stat. 1792, ch. 36, § 2, Vol. 1, p. 276.

modes of proceeding shall be, in suits of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law." The course of proceeding in the civil law was thus made the basis of the general rule of proceeding in these courts.[1] This last provision was afterwards extended by statute[2] to the courts held in those States which had been admitted into the Union subsequent to the passage of the act first above mentioned; subject, however, to such alterations and additions as the courts themselves, in their discretion, might deem expedient, or as the Supreme Court might, by rules, prescribe. And by a later statute,[3] the Supreme Court is fully empowered, from time to time, to prescribe and regulate and alter the forms of process to be used in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law or in admiralty and in equity in those courts, and the modes of obtaining and taking evidence; and generally to regulate the whole practice therein, so as to prevent delays, and to promote brevity and succinctness in the pleadings and proceedings.

§ 389. Under this last statute the Supreme Court has made rules, prescribing with some particularity, as hereafter will be seen, the method of pleading and of practice in the district and circuit courts, not only in suits at common law, but also in causes of equity and in admiralty. But as the course of the civil law is still recognized as the basis of the practice in admiralty, it is obvious that this law is still to be resorted to, in all points of proceedings and practice, not otherwise regulated by the rules of the Supreme Court. It is, however, to be remembered, that though the practice, in courts of equity and of admiralty, is originally deduced from the common fountain of the civil law, it has acquired, in its progress, a diversity of modes, from the different channels through which it has been drawn; the practice in equity having been mainly derived through the medium of the canon law, as administered in the Ecclesiastial Courts, while the general rules of practice in admiralty have come to us more directly from the Roman civil law, though somewhat modified by the maritime codes subsequently

[1] The Adeline, 9 Cranch, 284.
[2] U. S. Stat. 1828, ch. 68, § 1, Vol. 4, p. 278.
[3] U. S. Stat. 1842, ch. 188, § 6, Vol. 5, p. 518.

promulgated.[1] It is, therefore, material for us to understand the leading rules of practice in the Roman tribunals.

§ 390. In the earlier period of the Roman law, the party aggrieved might summon his adversary in person, or if he resisted or hesitated (*struitve pedes*) might seize him (*obtorto collo*) and drag him before the *Prætor;* but afterwards, and prior to the time of Justinian, the practice was settled in nearer conformity to that which has come down to our times, by causing the party to be summoned by the apparitors, or officers of the court.[2] The defendant appearing either voluntarily or by compulsion, the plaintiff proceeded to offer to the *Prætor* his libel, or cause of complaint, in writing, and with it produced such contracts or instruments as were the foundation of his title or complaint. The defendant then gave bail to appear at the third day afterwards, this period being allowed to him to consider whether or not he would contest the demand. If he contested it, for which a *formula* was prescribed, the *contestatio litis* being equivalent to the general issue at common law, he might demand that the plaintiff be sworn that the suit was not commenced out of malice, but that the debt or cause of action was, in his opinion, well founded; and the plaintiff might require the oath of the defendant that his defence was made in good faith, without malice, and in the belief that it was a good defence.[3] These oaths were termed *juramenta calumniæ post litem contestatam;* and were required, not as evidence in the cause, but professedly as a check to vexatious litigation.[4] The *Prætor* then appointed the judges

[1] 3 Bl. Comm. 446; 1 Spence, Eq. Jur. of Chancery, pp. 709–712; 2 Browne, Civ. & Adm. Law, pp. 34, 348; Ware's Rep. 298, 389. I commend to the student's attentive perusal the decisions of Judge Ware in the District Court of Maine, which, for depth of learning and copiousness of legal literature, have not been surpassed by those of any other District Judge in the United States.

[2] Browne, Civ. & Adm. L. 350, 351.

[3] Gilbert, Forum Romanum, pp. 21, 22; Ware, R. 396. Et actor quidem juret, non calumniandi animo litem se movisse, sed existimando bonam causam habere: Reus autem non aliter suis allegationibus utatur, nisi prius et ipse juraverit, quod putans se bona instantia uti, ad reluctandum pervenerit. Code, lib. 2, tit. 59, l. 2.

[4] Ware, R. 395, 396. The nature of this remedy is thus explained by the learned Judge: "In all countries, and under all systems of jurisprudence, it has been found necessary to establish some check to causeless and vexatious litigation. In the jurisprudence of the common law, the principal check is the liability to costs. But in the jurisprudence of ancient Rome, it appears that a party was not liable for the costs of the adverse party, merely because judgment was rendered against him. He was liable only when he instituted an action without probable cause; that is, when the suit was vexatious, or, in the language of the Roman law, calumnious; and then costs were not given against him as part of the judgment, but could be recovered only by a new action, called an action of calumny, corresponding to an action for a malicious suit at common law. By this action, the party could recover ordinarily a tenth, but in some cases a fifth and even the fourth, of the sum in controversy in the former action. This was given as an indemnity for his ex-

(*dabat judices*), for trial of the cause, before whom the contested libel was brought, and upon this libel the plaintiff put in his "*positions*," to which the defendant was obliged to answer, in order to ascertain what he would admit, and so to supersede the necessity of proving it. But if he denied any part of the positions, then the part denied was formed into distinct "*articles*," and upon these articles interrogatories were framed to be exhibited to the witnesses, who were examined upon these alone by one of the judges, and the depositions were taken in writing by a notary or one of the judge's clerks. After sentence was pronounced by the judges, it was sent to the *Prætor* to be executed.[1]

§ 391. "Another part of the Roman jurisprudence, from which our admiralty practice has been in part derived, is the interrogatory actions of the Roman law. These were derived from the edict of the Prætor, and constituted a part of that large portion of the law of Rome called *Jus Prætorium* or *Jus honorarium*. The reason of the introduction of these actions was this. If the actor demanded in his action more than was his due, he failed in his whole demand; judgment was rendered against him, and, if he failed for this cause, it was with difficulty that he could be restored to his rights *in integrum*. As he could not, in all cases, know the precise extent of his rights, or rather of the defendant's liability, that is, whether he was liable for his whole demand, *in solido*, or for a part, as if the action was against him in his quality of heir, whether he succeeded to the whole inheritance or to a part, this action was allowed by the Prætor, in the nature of a bill of discovery to compel a disclosure, for the purpose of enabling the actor to make his claim to correspond precisely with his right and with the defendant's liability."[2]

penses, in being obliged to defend himself against a vexatious suit (*a*).

"In the time of Justinian, and perhaps at an earlier period, the action of calumny had fallen into desuetude, and he, as a substitute, required the oath of calumny." "But the oath of calumny, though not evidence, was an essential part of the proceedings in the cause. It was ordered by Justinian to be officially required by the judge, although not insisted upon by the parties, and if omitted it vitiated the whole proceedings. (*b*) The practice of requiring the oath of calumny appears to be preserved generally in the civil-law courts of the continent of Europe. It is not, however, observed in France, and Dupin condemns it as conducing more to perjury than to the prevention of litigation, which, he says, is more effectually checked by a liability for costs." (*c*) Id. pp. 395–397.

[1] Gilb. For. Rom. pp. 22, 23.

[2] Ware, R. 397.

(*a*) Gaii, Comm. Lib. 4, §§ 175–178; Inst. 4, 16, 1; Vinn. in loc.
(*b*) Gail, Pract. Obs. L. 1; Obs. 23, 1, and 90, 1; Huber, Prælect. Vol. 1, L. 4, 16, 2.
(*c*) Heinn. Recitationes, ed. Dupin, 4, 16, 1.

§ 392. "By a constitution of the Emperor Zeno, the law *de pluris petitione*, by which the actor failed, if he demanded too much, was abolished, and by the time of Justinian, if not at an earlier period, these interrogatory actions had fallen into disuse, as we learn from a fragment of Callistratus preserved in the Digest. A new practice arose of putting the interrogatories after contestation of suit, and the answers thus obtained, instead of furnishing the grounds for the commencement of an action, became evidence in the case for the adverse party. This appears from the law referred to above; *ad probationes sufficiunt ea, quæ ab adversa parte expressa fuerint.* The general practice of the courts, which have adopted the forms and modes of proceeding of the Roman law, of requiring the parties to answer interrogatories under oath, called positions and articles, or facts and articles, seems to be derived through this law of the Digest, and the later practice of the Roman forum, from the ancient interrogatory action; although Heineccius has expressed a contrary opinion."[1] This form of proceeding "has passed, with various modifications, into the practice of the courts of all nations which have adopted the Roman law as the basis of their jurisprudence. Either party may interrogate the other, as to any matter of fact which may be necessary to support the action or maintain the defence, and the party interrogated is bound to answer, unless his answer will implicate him in a crime. The answer is evidence against himself, but not to affect the rights of third persons."[2]

§ 393. "Modern practice has introduced another innovation, and has authorized, for the purpose of expediting causes, the introduction, substantially, of the positions and articles into the libel itself, although regularly they cannot, in the form of positions and articles, be propounded until after contestation of suit, and, of course, not until after the answer is in. A libel in this form is said to be an articulated libel, or a libel in articles. The evidence sought for is then obtained in the answer. It is a special answer to each article in the libel, and the *litis contestatio* when the pleadings are in this form, is said to be special and particular, in contradistinction to a simple libel, and a general answer amounting to the general issue. An issue is formed on each article.

"From this account it is apparent that the practice of the admiralty, so far as relates to the libel and answer, is in its forms

[1] Ware, R. 398. [2] Ware, R. 398.

identical with that of the Roman law. As in the Roman law, so in the admiralty, the parties are required to verify the cause of action and the defence by oath; the libel may either be simple or articulated, and the answer must correspond with it; either party, also, may require the other to answer interrogatories on oath, touching any matters which may be necessary to support the libel or the answer."[1]

§ 394. In the Roman practice, the libel having been filed, the defendant answered the charge, either by confessing it, or by a general denial of its truth, which is the original meaning of the *litis contestatio;* or by a defensive exception; either declinatory to the jurisdiction, or dilatory, postponing or delaying the suit, or peremptory, answering in effect to the plea in bar of the common law. The defendant having pleaded, the plaintiff replied; and the defendant might rejoin, termed a *duplicatio*, beyond which the parties were seldom suffered to go.[2] But though the old course of practice in the admiralty permitted new matter to be thus introduced by way of replication and rejoinder, the modern and more approved practice is to present new facts, when rendered necessary, in an amendment of the libel and answer.[3]

§ 395. Upon the basis of the Roman forms of proceeding, the outlines of which have been thus briefly sketched, the rules of modern practice have been founded; and upon this basis the Supreme Court of the United States, under the authority given by the statute before cited,[4] has constructed its Rules of Practice for the courts of the United States, in all causes of admiralty and maritime jurisdiction on the Instance side of the court. By these Rules it is ordered,[5] that all *libels in instance causes*, civil or maritime, shall state the *nature of the cause*, as, for example, that it is a cause civil or maritime, of contract, of tort or damage, of salvage, or of possession, or otherwise, as the case may be; and if the libel

[1] Ware, R. 399. I have not hesitated to adopt the language of Judge Ware, on this subject, his lucid and succinct account of the forms of proceeding in the Roman tribunals being precisely adapted to my present purpose. The student will find a more extended account of those forms of proceeding in Gilbert's Forum Romanum, ch. 2, 3, and 4. And see Story, Eq. Pl. § 14, note; Oughton, Ordo Judiciorum, *passim;* Brissonius, De Formulis Pop. Rom. lib. 5, De formulis judiciariis. See also Sherwood *v.* Hall, 3 Sumn. 130.

[2] Browne, Civ. & Adm. L. 362–367, 416.

[3] The Sarah Ann, 2 Sumn. 208; Coffin *v.* Jenkins, 3 Story, R. 108, 121. New matters may also be introduced by way of supplemental libel and answer; as in Waring *v.* Clarke, 5 How. S. C. R. 441. [See Reg. 52, 17 How. 6; Taber *v.* Jenny, 19 Law Rep. 27.]

[4] U. S. Stat. 1842, ch. 188, § 6, Vol. 5, p. 518; *Supra*, § 388.

[5] Reg. 23. No summons or other mesne process is to be issued until the libel is filed. Reg. 1.

is *in rem*, that the property is *within the district;* and if *in personam*, the names, occupations, and place of residence of the parties. The libel must also *propound* and *articulate* in *distinct* articles, the various allegations of fact, upon which the libellant relies for the support of his suit, so that the defendant may be enabled to *answer distinctly and separately* the several matters contained in each article;[1] and it must conclude with a *prayer of the process* requisite to enforce the rights of the libellant, and for such *relief and redress* as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him at the close or conclusion of the libel, touching all or any of the allegations it contains.[2] It is not necessary, in all cases, that the libel be sworn to in the first instance, unless when it is founded on a claim of debt; but the defendant may always demand the oath of the libellant to the libel, if he chooses.[3] In suits *in rem*, however, the party claiming the property is required to verify his claim on oath or affirmation, stating that he, or the person in whose behalf he interposes, and none other, is the true and *bonâ fide* owner of the property; and also stating his authority, if he is acting for the owner.[4]

§ 396. In like manner it is required that *informations*, and *libels of information* for any breach of the revenue or navigation or other laws of the United States, should state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction; and the district within which the property is brought, or where it then is. The informa-

[1] The Virgil, 2 W. Rob. 204; The Boston, 1 Sumn. 328; Treadwell *v.* Joseph, Id. 390. In a suit for wages, for a share in a whaling voyage, where a charge of general and habitual misconduct is to be made out in defence, it should be propounded in exact terms for the purpose; and where specific acts of misconduct are to be relied on, they should be specifically alleged, with due certainty of time, place, and other circumstances. Macomber *v.* Thompson, 1 Sumn. 384; Orne *v.* Townsend, 4 Mason, 542. But the libel need not state matters of defence. The Aurora, 7 Cranch, 382, 389.

[2] It is obvious that this rule expresses nothing more nor less than is required in the old Latin couplet, quoted in Conset's Brief Discourse on the Form of a Libel:—

Quis, quid, coram quo, quo jure petatur, et à quo,
Recte compositus quique Libellus habet.

See Hall's Adm. Pract. p. 124; *Infra*, § 413.

[3] Hutson *v.* Jordan, Ware, R. 391; Coffin *v.* Jenkins, 3 Story, R. 121. [And see The L. B Goldsmith, 1 Newb. 123. A libel filed in another suit is not evidence against the libellant of the facts stated therein. Church *v.* Shelton, 2 Curtis, C. C. 271.]

[4] Rules in Admiralty, Reg. 26; U. States *v* Casks of Wine, 1 Pet. 547, 549; Houseman *v.* The North Carolina, 15 Pet. 40. As to the persons entitled to make claim, see The Lively, 1 Gall. 315; The Sally, Id. 400; The Adeline, 9 Cranch, 244; The Bello Corrunes, 6 Wheat. 152; The Antelope, 10 Wheat. 66; The London Packet, 1 Mason, 14; The Packet, 3 Mason, 255; The Boston, 1 Sumn. 328, 333.

tion or libel must also propound, in distinct articles, the matters relied on as grounds of forfeiture, averring the same to be contrary to the statute or statutes in such case provided; and concluding with a prayer of process, and notice to all persons in interest, to appear and show cause why the forfeiture should not be decreed.[1]

§ 397. Informations and libels may be *amended* in matters of form, at any time, on motion as of course; and new counts or articles may be filed and amendments in matters of substance may be made, on motion and upon terms, at any time before the final decree.[2] Where merits clearly appear upon the record, it is the settled practice in admiralty not to dismiss the libel for any defect or mistake in the statement of the libellant's claim or title, but to allow him to assert his rights in a new allegation.[3] But though the most liberal principles prevail in admiralty courts in regard to amendments, the libellant will not be permitted, in the appellate court, to introduce, by way of amendment, a new *res* or subject of controversy, which did not go up by appeal.[4]

§ 398. In all causes civil and maritime, whether *in rem* or *in personam*, the *answer of the defendant* to the allegations in the libel must be on oath or solemn affirmation. His answer must be full, and explicit and distinct to each separate article and separate allegation in the libel, in the same order as they are there numbered; and he is required to answer, in like manner, each interrogatory propounded at the close of the libel.[5] But he may, in his answer,

[1] Rules in Admiralty, Reg. 22. Technical niceties, unimportant in themselves, and standing only on precedents, the reasons of which cannot be discerned, are not regarded in libels of information in admiralty. It is sufficient if the offence be described in the words of the law, and be so described, that if the allegation be true, the case must be within the statute, the facts being so indicated as to give reasonable notice to the party to enable him to shape his defence. The Hoppet, 7 Cranch, 394; The Samuel, 1 Wheat. 15; The Merino, 9 Wheat. 401; The Palmyra, 12 Wheat. 13.

[2] Rules in Admiralty, Reg. 24. And see Orne *v.* Townsend, 4 Mason, 541. [* A libel *in rem* against a vessel, and personally against her master, may properly, under the present practice established by United States Supreme Court, be joined. And if the libellant have originally proceeded against vessel, master, *owners, and pilot*, the libel may, with leave of the court, be amended so as to apply to the vessel and master only in the way mentioned. Newell *v.* Norton and Ship, 3 Wallace U. S. R. 257.]

[3] The Adeline, 9 Cranch, 284; Anon. 1 Gall. 22.

[4] Houseman *v.* The North Carolina, 15 Pet. 40, 50. And see 2 Browne, Civ. & Adm. L. p. 416; The Boston, 1 Sumn. 328; [Kynoch *v.* The S. C. Ives, 1 Newb. 205; Coffin *v.* Jenkins, 3 Story, 108; Udall *v.* Steamship Ohio, 17 How. 17; but see Weaver *v.* Thompson, 1 Wall. Jr., 343. For the rules as to the amendment of answers in admiralty on appeal to the Circuit Court, see Lamb. *v.* Parkman, 21 Law Rep. 589.]

[5] Rules in Admiralty, Reg. 27. And see The William Harris, Ware, R. 367, 369; Coffin *v.* Jenkins, 3 Story, R. 109; Hutson *v.* Jordan, Ware, R. 385; Dunlap's Adm. Pract. 201, 202; The Boston,

object to answer any allegation or interrogatory in the libel, which will expose him to any prosecution or punishment for a crime, or to any penalty or forfeiture of his property for a penal offence.[1] If he omits to answer upon the return of the process, or other day assigned by the court, the libel may be taken *pro confesso* against him.[2] And if he answers, but does not answer fully, explicitly, and distinctly, to all the matters in any article in the libel, the court, upon exception taken thereto, may by attachment compel him to make further answer, or may order that the matter of exception be taken *pro confesso* against the defendant to the full purport and effect of the article thus insufficiently answered.[3] It is not, however, bound to proceed to this extent; but in such cases of what is termed *presumptive confession*, it may limit the presumption to that portion of the article to which the exception is well taken.[4]

§ 399. The *defendant may require the personal answer of the libellant*, upon oath, or solemn affirmation, to any interrogatories which he may propound at the close of his own answer, touching any matters charged in the libel, or any matter of defence set up by himself; not exposing the libellant to criminal prosecution or punishment, nor to a penalty or forfeiture for a penal offence. And in default of due answer, the libel may be dismissed, or the libellant may be compelled by attachment to answer, or the matter of the interrogatory may be taken *pro confesso* in favor of the defendant at the discretion of the court.[5] This right of requiring the answer of the adverse party, upon oath, to interrogatories pertinent to the cause, is a mutual right, and may be claimed at any stage of the cause, even down to the hearing.[6]

§ 400. Where the purposes of justice require it, the court has

1 Sumn. 328. [This rule does not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless ordered by the District Judge. Additional Rule in Admiralty, 10 How. 5.] A similar answer is required of the garnishee in a foreign attachment. Rules in Adm. Reg. 37. [See McDonald *v.* Rennel, 21 Law Rep. 157.]

[1] Rules in Admiralty, Reg. 31. And see U. States *v.* Packages, Gilp. R. 306, 313; Dunlap's Adm. Pract 207.

[2] Id. Reg. 29. And see Clerke's Praxis, tit. 24; Hall's Adm. Pract. p. 52. If the omission is through ignorance of the practice of the court, and the defendant is absent at the time of hearing, the court is not precluded from receiving any evidence which his counsel, as *amicus curiæ*, may offer. The David Pratt, Ware, R. 495.

[3] Id. Reg. 30. Exceptions to any libel or answer may be taken, for surplusage, irrelevancy, impertinence, or scandal; and referred to a Master, as in Equity. Id. Reg. 36.

[4] Dunlap's Adm. Pract. 204.

[5] Rules in Admiralty, Reg. 32. Each party, on the Instance side, may require the oath of the other. Gammell *v.* Skinner, 2 Gall. 45. The David Pratt, Ware, R. 495. A person intervening *pro interesse suo*, has the same privilege. Rules in Admiralty, Reg. 34, 43.

[6] 2 Browne, Civ. & Adm L. p. 416.

power to refer any matters, arising in the progress of the suit, to one or more *Commissioners* to be appointed by the court to hear the parties and make report therein ; these Commissioners having all the powers of Masters in Chancery.[1]

§ 401. It may here be added, that, in the Roman law, causes are either *plenary* or *summary*. *Plenary* causes are those in which the order and solemnity of the law are strictly observed, in the regular *contestation* of the suit, a regular *term to propound*, and a solemn *conclusion* of the acts; the least omission or infringement of which nullifies the proceedings. *Summary* proceedings are those in which this order and solemnity are dispensed with ; the suit is deemed *contested* by the next contradictory act concerning the merits, after the libel is put in ; there is no assignation to propound, and no express conclusion. And all causes in admiralty are *summary*, or "instantaneous"; it being of primary importance to the interests of commerce and navigation that justice be done with the least possible delay.[2]

[1] Rules in Admiralty, Reg. 44; *Supra*, §§ 332–336.

[2] 2 Browne, Civ. & Adm. L. 413. And see Gaines *v.* Travis, 8 Leg. Obs. 48; Brissonius, De Verb. Significat. verb. *Summatim;* Pratt *v.* Thomas, Ware, R. 435, 436. Hence it is, that courts of admiralty do not require all the technical precision and accuracy in pleading, which is demanded in the courts of common law. It is only requisite that the cause of action should be plainly and explicitly set forth, not in any particular formula, but in clear and intelligible language, so that the adverse party may understand what he is required to answer, and make up an issue upon the charge. Jenks *v.* Lewis, Ware, R. 52. Courts of admiralty, as far as their powers and jurisdiction extend, act upon the enlarged and liberal jurisprudence of courts of equity. Brown *v.* Lull, 2 Sumn. 443. Hence the rule applies here, as in other courts of equity, that the party who asks aid must come with clean hands. The Boston, 1 Sumn. 328. Hence, also, it is, that a condemnation against one defendant who is in contumacy, or makes no answer, does not prevent another defendant from contesting, so far as respects himself, the very fact which is thus admitted by the party in default; The Mary, 9 Cranch, 126, 143; — that an agreement in court, in respect to the disposition of the cause, if made under a mistake, will be set aside; The Hiram, 1 Wheat. 440; — that the court will, in a case of fraud, or something equivalent to it, or for other strong reasons, suffer a cause to be reopened for the correction of a particular error, after it has been closed; The Fortitudo, 2 Dods. 58; The Monarch, 1 W. Rob. 21; The New England, 3 Sumn. 495, 506; Jacobsen's Sea Laws, pp. 395, 396; — that it will not lend its aid to enforce contracts essentially vicious, or tainted with fraud or extortion; The Cognac, 2 Hagg. 377; — and that it will interpret maritime contracts with greater liberality than is found in the stricter doctrines of the common law; Ellison *v.* The Bellona, Bee, R. 106; The Nelson, 6 C. Rob. 227; [The Minerva, 1 Hagg. 347; The Prince Frederic, 2 Id. 394; The Cypress, 1 Blatchf. & H. 83; The Triton, Id. 282; The Betsey and Rhoda, Davcis, 112; The Heart of Oak, 1 W. Rob. 204. But though courts of admiralty act upon equitable principles, they have no power to administer equitable rights in cases not otherwise within their jurisdiction. Andrews *v.* Essex F. & M. Ins. Co., 3 Mas. 6; Davis *v.* Child, Dav. 71; Kellum *v.* Emerson, 2 Curt. C. C. 79; Kynoch *v.* The S. C. Ives, 1 Newb. 205.] [*An assignee of a *chose in action* may sue in his own name in the admiralty. And this is so, if the assignment be only of a part of the entire right: at least the respondents cannot object, on that ground, if the whole right be represented by the libellants. Swett *v.* Black, Sprague's Decisions, 574.]

# CHAPTER II.

## OF EVIDENCE IN INSTANCE CAUSES.

[*§ 402. How far rules of evidence in admiralty are same as at common law.
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### 1. GENERAL RULES.

§ 402. THE rules of evidence in admiralty and maritime causes, as well as in causes in Equity, are generally the same as at Common Law, so far as regards the relevancy of evidence, the proof of the substance of the issue, the burden of proof, the requisition of the best evidence, the competency of witnesses, and some other points; all which have been sufficiently treated in a preceding volume. A few additional particulars only will here be noted, which either distinguish proceedings in admiralty, or illustrate the application of those rules in admiralty courts.

§ 403. Thus, as to the *relevancy of evidence*, it is a rule in admiralty, that the proofs and allegations must coincide; evidence of facts not put in contestation by the pleadings, and allegations of facts not established by proofs, will alike be rejected.[1] The hearing is upon the pleas and proofs alone; *secundum allegata et probata;* but the appellate court will sometimes permit parties, in that court, *non allegata allegare, et non probata probare*, under proper qualifications.[2]

[1] The Sarah Ann, 2 Sumn. 209; Pettingill *v.* Dinsmore, Daveis, R. 211. [But there is no doctrine of merely technical variance in the admiralty, and no effect is allowed to a variance which cannot have surprised the opposite party, except so far as an incomplete statement of his case may prejudice the mind of the judge against the party. Thus the court frequently decide collision cases upon points appearing in the evidence and not alleged in the pleadings, or alleged only by the party against whom the decision is made. The Wm. Penn, 3 Wash. 484; The Lady Anne, 1 Eng. Law & Eq. 674; The Clement, 2 Curtis, C. C. 363; The Aliwal, 25 Eng. Law & Eq. 602. See also Dupont *v.* Vance, 19 How. 162.]

[2] Id. 210; The Marianna Flora, 11 Wheat. 38; The Boston, 1 Sumn. 331; [The New England, Newb. 481.]

§ 404. So as to the *burden of proof*, the general rule is recognized, that the obligation of proving any fact ordinarily is incumbent on him who alleges it. Thus, in cases of *collision*, the court will require preponderating evidence to fix the loss on the party charged, before it will adjudge him to make compensation.[1] So where, in an Instance or Revenue cause, a *primâ facie* case of forfeiture is made out on the part of the prosecution, the burden of proof is thrown on the *claimant*, to explain the difficulties of the case, by the production of papers and other evidence, which, if the ship, as he alleges, be innocent, must be in his possession or under his control; on failure of which, condemnation follows, the defect of testimony being deemed presumptive evidence of guilt.[2] So, where a forfeiture of goods is claimed, for importation in a vessel *not neutral*, the burden of proof of the vessel's neutrality is devolved on the claimant, he holding the affirmative, and the facts being particularly within his own knowledge and privity; and this, notwithstanding the negative averment, as to the neutral character of the property, in the libel or information.[3] And generally, where the law presumes the affirmative, the proof of the negative is thrown on the other side; and where any justification is set up, the burden of proof is on the party justifying.[4] In cases of *appeals*, also, the burden of proof is on the appellant, to demonstrate beyond a reasonable doubt a mistake or error of law or fact in the judgment of the court below, or gross excess in the amount of damage awarded.[5]

§ 405. And so, also, respecting the requirement of the *best evidence*, the principle of the general rule is admitted in courts of admiralty, although, in its application, evidence is sometimes received

[1] The Ligo, 2 Hagg. 356. And see The Columbine, 2 W. Rob. 30. But the burden of proving that a collision with a vessel *at anchor* arose from inevitable accident lies on the party asserting it. The George, 9 Jur. 670. See *infra*, §§ 406, 407. [See The Summit, 2 Curtis, 150.]

[2] The Luminary, 8 Wheat. 407, 412. The burden of proof is generally on the claimant, where a special defence is set up. The Short Staple, 1 Gall. 104; Ten Hds. of Rum, Id. 188. And where the fact is clear, and the explanation doubtful, the court judges by the fact. The Union, 1 Hagg. 36; The Paul Sherman, 1 Pet. C. C. R. 98. Where a seizure is made, upon probable cause, pursuant to the Revenue Act, U. S. Stat. 1799, ch. 22, § 71, Vol. 1, p. 678, the statute expressly devolves the burden of proof on the claimant.

[3] United States *v.* Hayward, 2 Gall. 485.

[4] Idem, p. 498; Treadwell *v.* Joseph, 1 Sumn. 390. [* Where goods shipped under a common bill of lading are damaged, and the carrier seeks to exonerate himself from liability by reason of perils of the sea, the burden of proof is upon him. The Schooner Emma Johnson, Sprague's Decisions, 527.]

[5] Cushman *v.* Ryan, 1 Story, R. 91, 97.

as the best evidence, which courts of common law and of equity would reject. This arises from the peculiar nature of the subjects and circumstances which admiralty has to deal with, and from the impossibility of otherwise administering justice in particular cases. It is on this ground that the testimony of the persons on board the ship of the salvors, and of the wreck, and of those on board ships coming in collision, is sometimes received, even when objectionable at law on the score of interest, or on other grounds;[1] as will be shown in another place. And accordingly, in a cause of collision, it was held, that the protest of the master of a foreign vessel, in tow by the vessel run foul of, being *res inter alios acta*, was not admissible in evidence, *except* in a case of necessity, where other evidence could not be obtained.[2]

§ 406. From the same cause, namely, the peculiar necessity arising out of the nature of transactions on shipboard and at sea, the rules of *presumptive evidence* are applied more familiarly and with a larger freedom in courts of admiralty than in equity or at common law. This is especially the case in revenue causes, and in cases of collision, and of collusive capture. Accordingly, where the *res gestæ*, in a *revenue cause*, are incapable of an explanation consistent with the innocence of the party, condemnation follows, though there be no positive testimony that the offence has been committed.[3] And when the question arises whether an act has been committed which is a cause of forfeiture, an apparent *intention* to evade the payment of duties, though not, *per se*, a cause of forfeiture, will justify the court in not putting upon the conduct of the party an interpretation as favorable as, under the circumstances, it would be disposed to do.[4] In cases of *collision*, also, where the evidence on both sides is conflicting and nicely balanced, while the court will be guided by the probabilities of the respective cases which are set up, it will at the same time presume, *à priori*, that the master of a ship does what is right, and follows the regular and correct course of navigation.[5] It will also be presumed, in maritime transactions, that the usual and ordinary course of conducting business was pursued; as, for example, that where goods are shipped under the common bill of lading, they were shipped to be put under deck.[6] So, in cases of collision,

[1] See *infra*, §§ 412, 414.
[2] The Betsey Caines, 2 Hagg. 28.
[3] The Robert Edwards, 6 Wheat. 187.
[4] Ibid.
[5] The Mary, 2 W. Rob. 244.
[6] Vernard *v.* Hudson, 3 Sumn. 405.

where the evidence is nicely balanced, the presumption *à priori* is, that the master would follow the ordinary course.[1]

§ 407. In cases of collision, the rules of presumption are deduced from *nautical experience* and the settled *usages of navigation.* Hence, if a ship, sailing with a fair wind, runs down another sailing upon a wind or plying to windward, it is presumed, *primâ facie*, to be the fault of the former; and ships are sailing large, or going before the wind, in the same the burden of proof is adjusted accordingly. So, if both direction, and with ample sea-room, and one runs foul of the other, it is presumed to be the fault of the pursuing ship. And where one ship is at anchor, and a ship under sail runs foul of her, the sailing ship is presumed to be in fault. This presumption is stronger in open sea than in rivers; but it has force even in rivers, where due allowance ought to be made for the current or tide bearing the ship out of her apparent course.[2] It may be added, in this connection, that it is a well-established rule, where two vessels are approaching each other on opposite tacks, that the vessel on the larboard tack must "give way," and the vessel on the starboard tack must keep her course;[3] though the former may be close-hauled, and the latter may have the wind several points free.[4] If the former should endeavor to avoid the collision by passing to windward, instead of giving way, she is responsible for the damage, if a collision should ensue.[5] So, if the

[1] The Mary Stewart, 2 W. Rob. 244.

[2] Van Heythuysen, Mar. Evid. pp. 20, 21; The Woodrop Sims, 2 Dods. 87; The Chester, 3 Hagg. 318; The Baron Holberg, Id. 215; Sills *v.* Brown, 9 C. & P. 601; The Speed, 2 W. Rob. 225; The Thames, 5 C. Rob. 308; The Girolamo, 3 Hagg. 173; The Batavier, 10 Jur. 19; [The Clement, 2 Curtis, 363, where it appears that if one vessel had neglected an ordinary and proper measure of precaution, the burden of proof will lie on such vessel to show that the collision would have happened without her fault. See also The Virgil, 2 W. Rob. 201; The New York *v.* Rea, 18 How. 223, 224; The H. M. Wright, 1 Newb. 495. Although there is no rule of maritime law requiring vessels to carry lights at night, yet in collision cases courts of admiralty regard the want of a light as strong evidence of negligence. This is more especially the case with vessels lying at anchor in the path of other vessels. But the omission is only evidence of negligence and does not constitute it in all cases. See The Osprey, 2 Wall. C. C. 268; Ure *v.* Coffman, 19 How. 56; N. Y. & U. S. Co. *v.* Calderwood, Id. 241; The Rose, 2 W. Rob. 4; The Iron Duke, Ib. 377; The Victoria, 3 Id. 49.] [* By the maritime law, a vessel at anchor, in a thoroughfare, in a dark night, is bound to exhibit a light. Lenox *v.* Winisimet Company, Sprague's Decisions, 160.]

[3] The Ann and Mary, 2 W. Rob. 189, 196; The Jupiter, 3 Hagg. 320; The Alexander Wise, 2 W. Rob. 65; The Harriet, 1 W. Rob. 182; The John Brotherick, 8 Jur. 276; The Leopard, Daveis, R. 193. The expression "giving way," in the Trinity House regulations, means getting out of the way by whatever may be the proper measures, whether it be by porting or starboarding the helm. The Gazelle, 10 Jur. 1065; The Lady Anne, 15 Jur. 18; 1 Eng. Law & Eq. R. 670.

[4] The Traveller, 2 W. Rob. 197; The Speed, Id. 225; The Jupiter, 3 Hagg. Adm. R. 320.

[5] The Mary, 2 W. Rob. 244.

latter, with the like endeavor, should bear up, instead of keeping her course.[1] But though these rules are not lightly to be disregarded, yet no vessel, especially a steamer, should unnecessarily incur the probability of a collision, by a pertinacious adherence to them; but where there is imminent danger of collision, shipmasters are bound to use whatever prudential measures the crisis may require, in order to avoid it.[2] A steamer is always to be treated as a vessel sailing with a fair wind; and is, in all cases, bound to give way to a vessel moved by sails.[3]

§ 408. In regard to the presumption arising from *the non-production or the spoliation of papers*, as the title to ships and their cargoes is to be proved chiefly by documents, and these it is generally in the power of the true owner either to produce, or satisfactorily to account for their absence; their non-production always leads to inferences unfavorable to title of the claimant.[4] Hence the rule of *omnia præsumuntur contra spoliatorem* is administered in the courts of admiralty with more frequency and a more stringent

[1] The Jupiter, 3 Hagg. 320; The Carolus, Id. 343, n.

[2] The Hope, 1 W. Rob. 157; The Virgil, 2 W. Rob. 201; The Itinerant, Id. 240; The Blenheim, 10 Jur. 79; The Lady Anne, 1 Eng. Law & Eq. R. 670; 15 Jur. 18, S. C. [* The Ann Caroline, 2 Wallace, U. S. R. 538.]

[3] The Leopard, Daveis, R. 193, 197; The Shannon, 2 Hagg. 173; [The Eastern State, 2 Curt. C. C. 141;] 3 Kent, Comm. 231. [In England the rule is that when a sailing vessel going free meets a steamer, both must turn to the right, the steamer being regarded as a vessel going free. The City of London, 4 Notes of Cases, 40; Merchants' Shipping Act, 17 & 18 Vict. § 296. But in the United States the rule has been declared to be as laid down in the text, and the steamer must give way in all cases. The Osprey, 17 Law Rep. 384; The Steamer Oregon, 18 How. 570.] Respecting steamers generally, it was remarked, by Sir John Nicholl, that "they are a new species of vessels, and call forth new rules and considerations; they are of vast power, liable to inflict great injury, and particularly dangerous to coasters, if not most carefully managed; yet they may, at the same time, with due vigilance, easily avoid doing damage, for they are much under command, both by altering the helm and by stopping the engines; they usually belong to great and opulent companies, and are fitted out at great cost; and on these considerations, when they afford assistance, they obtain a large remuneration. The owners of sailing vessels have, I think," added he, "a right to expect that steamers will take every possible precaution." The Perth, 3 Hagg. Adm. R. 415, 416; [The Europa, 2 Eng. Law & Eq. 557.] Hence the general rule in the text has been adopted; and accordingly it has been held, that a steamer, descending a river in the night, and meeting a sailing vessel ascending, is bound to ease her engine and slacken her speed, until she ascertains the course of the sailing vessel. The James Watt, 2 W. Rob. 270. The usage on the river Ohio, at all times, is, that when steamers are approaching each other in opposite directions, and a collision is apprehended, the descending boat must stop her engine, ring her bell, and float; leaving to the ascending boat the option how to pass. Williamson *v.* Barrett, 13 How. S. C. R. 101. [* In Pearce *v.* Page, 24 How. 228, which was the case of a collision between a flat-boat descending, and a steamer ascending the Ohio River, McLean, J., says: "The self-moving power must take the responsible action. . . . . When a floating boat follows the course of the current, the steamer must judge of its course so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use."]

[4] See *ante*, Vol. 1, § 37; Owen *v.* Flack, 2 Sim. & Stu. 606.

application than in any other tribunals.[1] Thus, though the spoliation of papers is not, *per se*, a cause of condemnation, yet if it is attended with other circumstances of suspicion, the guilty party will not have the aid of the court, or be admitted to further proof;[2] but, on the other hand, if such spoliation appears, in a case otherwise favorably circumstanced for the party, the court, for its own satisfaction, will order further proof at his expense.[3] The mere suppression or non-production of papers, not destroyed, leads to a similar unfavorable inference. Thus, in a cause of damage, where the master of the aggressive ship addressed a letter to his owners, and gave it to the master of the damaged vessel to be delivered to them, but the owners did not produce the letter; it was presumed that the letter contained an admission of the damage.[4] And we may here add, that the production of documents in admiralty is governed by rules substantially like those in similar cases in equity, which have already been considered.[5]

### 2. COMPETENCY OF WITNESSES.

§ 409. In the Roman law, evidence was distinguished into two classes, namely, *plena probatio*, or full proof, and *semiplena probatio*, or half proof. The former consisted of admissions and confessions, the testimony of witnesses, public written instruments and deeds, judicial oaths and presumptions *juris et de jure*. The latter consisted of the testimony of a single witness, private books of account, common fame, and comparison of handwriting. And the conjunction of two half proofs amounted to full proof.[6] But though a single witness ordinarily made but half proof, yet exceptions were admitted to this rule, where, in cases of great difficulty, no other evidence could possibly be had, and in cases of minor importance, or where the witness was of extraordinary rank or character;[7] and, on the other hand, common fame, in some

[1] The Hunter, 1 Dods. 480; The Liverpool Packet, 1 Gall. 518. And see *infra*, § 452.

[2] The Rising Sun, 2 C. Rob. 104, 106; The Pizarro, 2 Wheat. 227, 241; The Juffrouw Anna, 1 C. Rob. 125; The Welvaart, Id. 122, 124; The Eenrom, 2 C. Rob. 1, 15.

[3] The Polly, 2 C. Rob. 361.

[4] The Neptune 2d, 1 Dods. 469.

[5] *Supra*, §§ 295 – 307.

[6] 2 Browne, Civ. & Adm. L. 370, 385.

[7] Idem, 385. These exceptions are thus enumerated by Mascardus: Cuando unius testis depositio nemini nocet, et alteri prodest; — quando esset arduum, vel nullo modo fieri posset, ut plures possint haberi testes; — quando sumus in causis possessorii, quæque nullius propemodum sint ponderis; — in causis quæ brevitèr et summariè absolvuntur et dirimuntur, teste valdè digno. Mascard. De Prob. Quæst. 11, n. 14, 17, 18, 19.

cases, was received as equivalent to full proof.[1] But this distinction of proofs is scarcely known in most of the American courts, and is seldom admitted in any of them as a rule of decision; but is recognized chiefly as the original source of the rule by which, in certain cases, the oath of the party may be received.[2]

§ 410. In regard to the *competency of the parties as witnesses*, there are three cases in which their oaths are admitted at hearings upon the merits, in courts of admiralty.[3] The *first* of these is where the *suppletory oath* is required. This oath, as its name imports, was not admissible by the Roman law, unless in aid of other testimony and to supply its deficiencies. If nothing was proved, or if full proof was made, there was no place for a suppletory oath. It was only where half proof was exhibited, and in the absence of any other means of making full proof, that the party's own oath was received, as the complement of the measure of testimony required; and this might be administered in all cases.[4] But in the practice of our own admiralty courts, though the right of resorting to the suppletory oath in all cases of partial proof is still insisted on,[5] yet it is not ordinarily administered, except in support of the party's books of account, or other original charges

[1] Mascard. De Prob. Concl. 236 n. 1, 2; Id. Concl. 396, n. 2; Id. Concl. 750, n. 1. Common fame, among the civilians, was distinguished from notoriety, which they defined as a species of proof, se oculis hominum, aut majoris partis exhibentem, ut nulla possit tergiversatione celari aut negari, utpote cujus universus populus, aut major pars ejus, testis esse possit. Mascard. De Prob. Con. 1107, n. 4. And see 2 Browne, Civ. & Adm. L. p. 370.

[2] See *ante*, Vol. 1, § 119.

[3] [* In the United States the rules of evidence in admiralty cannot be changed by a State statute. The Ship William Jarvis, Sprague's Decisions, 485.]

[4] Hall's Adm. Pract. p. 93; Benedict's Adm. Pract. § 536; Dunl. Adm. Pract. p. 286; 2 Browne's Civ. and Adm. L. p. 384. The practice in such cases is thus stated by Mr. Hall, from Oughton's Eccl. Pract. tit. 186. "If the plaintiff has not fully proved his allegation, but has only given a half-proof thereof (*semiplena probatio*), he may appear before the Judge and propound as follows: —

"'I, N., do allege that I have proved the allegations contained in my libel, &c. I say that I have proved them fully, or at least, half fully; I refer myself to the acts of court and to the law, and therefore pray that the suppletory oath may be administered to me, for so the law and justice require.'

"Then the Proctor of the adverse party will say: —

"'I deny that those allegations are true. I protest of their nullity, and I allege that the said oath ought not to be administered, referring myself to law.'

"Then the Judge shall assign a time to hear the parties and decree thereon. And if he shall be satisfied that the party who prays to have the oath administered to him has made more than half proof, or at least half proof of his allegation, he is bound to administer the oath to him in those cases in which the law permits it; consult, however, with experienced practitioners, as to what those cases are. Then the party shall make oath, '*that of his own certain knowledge the facts stated in his allegation are true.*

"If, however, the party against whom the oath is prayed should be proved by his adversary to be a person of infamous or bad character, the oath is then in no case to be administered to him." Hall's Adm. Pract. *ubi supra*.

[5] Dunl. Adm. Pract. p. 288; Benedict, Adm. Pract. § 536.

of the like nature, as, for example, charges made by the master, on the back of the shipping paper, of advances made to the seamen in the course of the voyage.[1]

§ 411. In the *second* place, parties may be admitted to what is termed the *oath decisory*. This oath was of familiar use in the Roman tribunals. It might be administered by the judge to either party, for the more perfect satisfaction of his own conscience in cases rendered doubtful by the weakness or contradictions of the testimony already in the cause; or it might be tendered by one of the parties to the other, submitting to have the cause decided by the oath of his adversary; which the adverse party must either accept, or tender back a similar offer; failing to do which, he must be condemned, as confessing the allegations against him.[2] This mode of proof is known to have been resorted

[1] Ibid. The David Pratt, Ware, R. 496, 505. And see *ante*, Vol. I. §§ 117–119, as to the admissibility of books of account.

[2] The use of this oath is founded upon several texts of the civil law. Maximum remedium expediendarum litium in usum venit jurisjurandi religio; qua, vel ex pactione ipsorum litigatorum, vel ex auctoritate judicis, deciduntur controversiæ. Dig. lib. 12, tit. 2. l. 1. Pothier derives its authority from the texts, — Solent enim sæpe judices, in dubiis causis, exacto jurejurando, secundum eum judicare qui juraverit; — Dig. lib. 12, tit. 2, l. 31; — and, in bonæ fidei contractibus, necnon [etiam] in cæteris causis, inopia probationum, per judicem jurejurando causa cognita res decidi oportet. Cod. lib. tit. 1, l. 3. Upon these he comments as follows: —

"From these texts it follows, that to warrant the application of this oath, three things must concur: —

"1. The demand or the exceptions must not be fully proved, as appears by the terms of L. 3, Cod. — INOPIA PROBATIONUM. When the demand is fully proved, the judge condemns the defendant without having recourse to the oath; and on the other hand, when the exceptions are fully proved, the defendant must be discharged from the demand.

"2. The demand, or exceptions, although not fully proved, must not be wholly destitute of proof; this is the sense of the terms, *in rebus dubiis*, made use of in the Law 31; this expression is applied to cases in which the demand, or exceptions, are neither evidently just, the proof being not full and complete, nor evidently unjust, there being a sufficient commencement of proof. In quibus, says Vinnius, Sel. Quæst. 1, 44, judex dubius est, ob minus plenas probationes allatas.

"3. The judge must have entered upon the cognizance of the cause, to determine whether the oath ought to be deferred, and to which of the parties. This results from the terms *causâ cognitâ*, in L. 31.

"This cognizance of the cause consists in the examination of the merits of the proof, of the nature of the fact, and the qualities of the parties. When the proof of the fact which is the subject of the demand, or the exceptions, and upon which the decision of the cause depends, is full and complete, the judge ought not to defer the oath, but to decide the cause according to the proof.

"Nevertheless, if the judge, for the more perfect satisfaction of his conscience, defers the oath to the party in whose favor the decision ought to be, and the fact upon which it is deferred is the proper act of the party himself, and of which he cannot be ignorant, he cannot refuse to take it, or appeal from the sentence; for although the judge might, and even ought, to have decided the cause in his favor, without requiring this oath, the proof being complete, he has still done no injury by requiring it, since it costs the party nothing to affirm what is true, and his refusal weakens and destroys the proof which he has made.

"When the plaintiff has no proof of his demand, or the proof which he offers only raises a slight presumption, the judge ought not to defer the oath to him, however worthy of credit he may be. Nevertheless, if the circumstances raise some doubt in the mind of the judge, he may,

to in some cases in the American courts, so far at least as a tender of the oath by one party, and its acceptance by the other;[1] but the freedom with which parties may interrogate each other, *in limine* and the infrequency of any occasion to advert to the distinction between full and half proof, restricted, as we have just seen it to be, to cases of book accounts and the like, have rendered the oath decisory nearly obsolete in modern practice.

§ 412. In the *third place*, parties are sometimes admitted as *witnesses from necessity*. We have shown, in a preceding volume,[2] that in some of the courts of common law, parties have on this ground been held competent witnesses, while in some others this has been doubted or denied. But however this point may be held in the common law tribunals, the course of the courts of admiralty, and the nature of the causes before them, frequently requires the admission of this kind of evidence, without which there would often be a failure of justice. Thus, salvors, though parties to a suit for salvage, are admitted *ex necessitate* as witnesses to all facts which are deemed peculiarly or exclusively within their knowledge; but to other facts they are incompetent; on the general ground that they are both parties and interested. The exception arises from the necessity of trusting to their testimony or being left without proof; and it is admitted no further than this necessity exists.[3] Parties in prize causes are also admitted as witnesses, on the same principle, as hereafter will be seen. And gener-

to satisfy his conscience, defer the oath to the defendant.

"So, when the demand being made out, the exceptions against it are only supported by circumstances, which are too slight to warrant deferring the oath to the defendant, the judge may, if he thinks proper, defer the oath to the plaintiff, before he decides in his favor.

"I would, however, advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath, to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted.

"It remains to observe the following difference between an oath deferred by the judge, and that deferred by the party; the latter may be referred back; whereas, when the oath is deferred by the judge, the party must either take it or lose his cause; such is the practice of the bar, which is without reason charged by Faber with error; in support of it, it is sufficient to advert to the term *refer*; for I cannot be properly said to refer the oath to my adversary, unless he has previously deferred it to me. See Vin. Sel. Quæst. 143." Poth. Obl. Nos. 829–835.

[1] Dunl. Adm. Pract. p 290.

[2] *Ante*, Vol. 1, § 348.

[3] The Henry Ewbank, 1 Sumn. 400, 432. And see the Sara Barnardina, 2 Hagg. 151; The Pitt, Id. 149, n.; The Elizabeth and Jane, Ware, R. 35; The Boston, 1 Sumn. 328, 345. The testimony of parties in admiralty, it is said, ought never to be taken except under a special order of court, and for cause shown, as in equity. Ibid. [* See Swett v. Black, Sprague's Decisions, 574.]

ally, where the cause of action is established *aliunde*, and the loss is proved to have been occasioned by the fraud or tortious act of the defendant, nothing remaining to be shown except the value of the property lost, taken away, or destroyed, and this being incapable of proof by any other means, it may be ascertained by the oath of the plaintiff.[1]

§ 413. The *answer of the defendant*, though sworn to, and responsive to the libel, has not the same weight in courts of admiralty as in chancery, nor is it regarded strictly as testimony, to all intents, or as full proof of any fact it may contain; and yet it is not wholly to be disregarded by the judge, or treated as a merely formal statement of the ground of defence. When it is carefully drawn, and it appears, from comparing it with the facts proved in the case by disinterested witnesses, that the defendant has stated his case fairly, or with no more than that bias which one naturally feels towards his own cause, and with no more coloring than an upright man might insensibly give to facts in which his interest and feelings are involved, it may justly have a material influence on the mind of the judge, in coming to a final result. But there is no technical rule in the admiralty, like that in chancery, which binds the conscience of the court, or determines the precise degree of credit to which the answer is in all cases entitled, or the quantity of evidence by which it may be overborne; but it receives such weight as, in the particular state of the proofs, and under all the circumstances, the judge may deem it to deserve.[2] A *claim* to a vessel or cargo, interposed in a suit for a forfeiture, though sworn to, has not in any sense the dignity of testimony, and is not received in evidence; but is said to amount, at most, to "the exclusion of a conclusion."[3] But where the libellant specially requires the answers of the defendant, under oath, to interrogatories distinctly propounded to

[1] 2 Browne, Civ. & Adm. Law, p. 384; Dunl. Adm. Pract. p. 287; *Ante*, Vol. 1, § 348, n. The Roman law distinguished between losses by the mere *fault* of the defendant, and losses occasioned by his *fraud*. In the former case, the property was estimated at its intrinsic value, by the *juramentum veritatis*, or *oath of truth*; in the latter, by the *juramentum affectionis*, at its peculiar value to the owner, as a matter of personal attachment. Poth. Obl. No. 836; 2 Browne, Civ. & Adm. Law, *supra*. But this distinction is not recognized in modern practice.

[2] Hutson *v.* Jordan, Ware, R. 385, 387–389, 394; The Crusader, Id. 443; Sherwood *v.* Hall, 3 Sumn. 127, 131. And see The Matilda, 4 Hall, Law Journ. 487; The Thomas and Henry, 1 Brock. 367; Cushman *v.* Ryan, 1 Story, R. 91, 103; Jay *v.* Almy, 1 Woodb. & M. 262, 267; [Andrews *v.* Wall, 3 How. 568, 572; The Steamboat H. D. Bacon, 1 Newb. 276; The Napoleon, Olcott, 208.]

[3] The Thomas and Henry, 1 Brock. 367.

him, touching the matters in issue, which by the course of the court he has a right to do, these answers are treated as evidence in the cause for either party, as in chancery. But here, also, as in the case of the answer to the libel itself, no particular quantity of proof is required to overcome the answers to the interrogatories; but they are weighed like other testimony.[1]

§ 414. In regard to *persons not parties to the suit*, the general rule as to their incompetency as witnesses, *when interested in the cause*, is adopted in the admiralty, as an instance court,[2] in like manner as at common law.[3] But the exceptions to this rule, on the ground of necessity, are of much more frequent occurrence in the admiralty, arising from the nature of maritime affairs. Thus, in a cause of collision, the crew of the vessel proceeded against are held *competent witnesses from necessity*, notwithstanding they may be sharers in the profits and losses of the vessel, and do not deny their interest in the suit.[4] Sometimes parties, thus interested, are not admitted as witnesses until they have released their interest and are thereupon dismissed from the suit;[5] but the testimony of mere releasing witnesses, it is said, ought not to be relied on to prove a fundamental fact in a cause.[6]

[1] The David Pratt, Ware, R. 495; Jay *v.* Almy, 1 W. & M. 262. And see Rules in Admiralty, Reg. 23, 27 – 30; 2 Browne, Civ. & Adm. Law, 416; Clerke's Praxis, tit. 14; Gammell *v.* Skinner, 2 Gall. 45; *Supra*, §§ 395, 398. [A foreigner is not chargeable upon his declarations or admissions in English, without clear proof that he thoroughly understood what he said and what was said to him. The Lotty, Olcott, 329.]

[2] The Boston, 1 Sumn. 328, 343.

[3] [The State statutes admitting the testimony of parties and interested witnesses, though adopted, in the United States courts, in the trial of civil cases at the common law, have no effect upon the practice of those courts in admiralty. The Independence, 2 Curtis, C. C. 350. And see The Neptune, Olcott, 483.]

[4] The Catherine of Dover, 2 Hagg. 145; [The Osceola, Olcott, 450; The Hudson, Id. 396.] In a cause of damage by collision, the respondent pleaded as an exhibit a paper signed by the master and crew of the ship of the libellant, and a declaration of the mate of the same ship. The mate and crew were interested in the suit, in respect of their clothes, which had gone down in the ship. It was held that the admissions and declarations of the mate and crew were not competent to be received; but that those of the master were admissible. The Midlothian, 15 Jur. 806; 5 Eng. Law and Eq. R. 556. [* In a suit by the holder of a bottomry bond given by the master of a vessel, in a foreign port, for necessary supplies, the master is a competent witness to prove that the supplies were furnished, and that they were necessary. The Medora, Sprague's Decisions, 138.]

[5] The Pitt, 2 Hagg. 149, n. And see The Celt, 3 Hagg. 323.

[6] La Belle Coquette, 1 Dods. 19. But in cases of slave-capture, the evidence of releasing witnesses has been held good. The Sociedade Feliz, 2 W. Rob. 160. An informer, who is entitled to a portion of a fine, forfeiture, or penalty, is ordinarily not admissible as a witness for the prosecution. The statute only renders him competent when "he shall be necessary as a witness on the trial"; of which necessity the court must judge, after hearing the other testimony. The Thomas & Henry, 1 Brock. 367; U. S. Stat. 1799, ch. 22, § 91, Vol. 1, p. 697. [The master who hypothecated the vessel on a bottomry bond is a competent witness for the bondholder, especially if released by him. The Brig Magoun, Olcott, 55.]

§ 414 *a*. The admissibility of a *shipmaster as a witness for the owners*, in a *seaman's libel against them for wages*, may seem to fall under the operation of the same principle, so far as he may be deemed interested to defeat the claim. But, in truth, there seems to be no general objection to his competency in such cases, though, as Lord Stowell remarked, it certainly may be necessary to watch his testimony with jealousy, as his conduct may constitute a material part of the adverse case.[1]

§ 415. The case of *seamen, joint libellants for wages* in a court of admiralty, properly falls under this head. For, though by the admiralty law, they all may join in the same libel, as a matter of favor and privilege, on the general ground of the nature of their employment, and by our statute,[2] in proceedings *in rem* for wages they are bound so to do, the general privilege of admiralty law being thus converted into a positive obligation; yet they are not therefore regarded as joint parties in one suit. The contract is treated as a several and distinct contract with each seaman. Their rights, respectively, are separate, and the defences that may be set up by the owners of the ship, against the claim of one seaman, may be wholly inapplicable to that of another. The answer, therefore, when not equally applicable to all the crew, contains in separate allegations what is specially appropriate to each in particular; and the decree pursues the same course, assigning to each seaman the amount of wages to which he is entitled and dismissing the libel as to those who are not entitled to any. And no one can appeal from a decree, made in regard to the claim of another. Their only interest, then, in respect to the claims of each other, arises from their joint liability to costs; and as the costs are within the discretion of the court, this interest is not deemed sufficient to render them incompetent as witnesses for each other.[3] At all events, it is in the power of the court, on motion, to discharge from the libel, with their own consent, those whose testimony may be required.[4] But it has been held, that ordinarily one seaman cannot be a witness for another, in a libel for wages, if the witness and the party have a common interest in the matter in controver-

[1] The Lady Ann, 1 Edw. Adm. R. 235.

[2] U. S. Stat 1790, ch. 29, § 6, Vol. 1, p. 133.

[3] Oliver *v.* Alexander, 6 Pet. 145 – 147; [Ship Elizabeth *v.* Rickers, 2 Paine, C. C. 291. But their testimony is received with great caution, and the court will be inclined rather to believe the master when he has no interest. The Swallow, Olcott, 4; Graham *v.* Hoskins, Id. 224.]

[4] Dunl. Adm. Pract. p. 239; *Supra*, § 414. This, however, seems to have been deemed objectionable Dunl. *supra;* The Betsey, 2 Bro Penn. R. 350.

sy; as, for example, where the question is as to the loss of the ship, or an embezzlement equally affecting the whole crew, or negligence, misfeasance, or malfeasance, to which all must contribute, or the like. But where their cases are distinguished by special circumstances, as where, notwithstanding their contracts are similar, the breach or performance of one may happen without affecting the other, one seaman may be a witness for another; although, where they are involved in similar breaches of contract, they are to be heard with caution.[1]

§ 416. Courts of admiralty, also, like courts of common law,[2] recognize the admissibility of *experts*, or men of science, to testify their opinions upon matters in controversy, pertaining to the art or science in which they are peculiarly skilled. Thus, in a question of forfeiture for the illegal importation of certain hogsheads of rum, it was held competent for the prosecution to prove the place of origin of the rum by its particular flavor, ascertained, in the absence of other evidence, by the taste of persons skilled in judging of the article; the sense of tasting being capable of acquiring, in many instances, as great a degree of accuracy and precision as the eye.[3] So, on questions of seamanship, the opinions of nautical men, having before them a clear statement of all the facts, are admissible evidence in courts of admiralty, as well as those of men of science on points of science, in other courts.[4] And accordingly, in a case of collision, it was held, that a nautical person was a competent witness to say whether, upon the plaintiff's evidence and admitting it to be true, he was of opinion that by proper care on the part of the defendant's servants the collision could have been avoided.[5]

[1] Thompson *v.* The Philadelphia, 1 Pet. Adm. 210. Whether the master is a competent witness for the owner, in a libel against the ship for wages, has been doubted. The William Harris, Ware, R. 367. But see The Lady Ann, 1 Edw. Adm. R. 235, that he is admissible. He is not admissible to prove any matter of defence which originated in his own acts, and for which he is responsible; Ibid.; [and see also The Boston, 1 Sumn. 343; The Peytona, 2 Curt. C. C. 21. In the latter case it was held that a release by one of the part-owners of the ship would make him a competent witness.] He is not admissible for the claimant, in a libel against the ship for forfeiture, by reason of an illegal act done under him. Fuller *v.* Jackson, Bunb. 140; The Nymph, Ware, R. 257; The Hope, 2 Gall. 48. Neither is he competent to prove that a sufficient medicine-chest was on board, for the purpose of throwing the expense of medical advice on the seamen. The William Harris, *supra*. The proper evidence of that fact is the testimony of a respectable physician, who has examined the medicine-chest. Ibid. [The admissions of the master are admissible in a suit for wages against the owners. The Enterprise, 2 Curt. C. C. 317.]

[2] See *ante*, Vol. 1, § 440.

[3] United States *v.* Ten Hhds. of Rum, 1 Gall. 188; The Rose, Id. 211

[4] The Ann & Mary, 7 Jur. 1001.

[5] Fenwick *v.* Bell, 1 C. & K. 312. The

### 3. DOCUMENTS.

§ 417. The general rules of evidence in courts of admiralty, respecting the admissibility, proof, and effect of *documents*, whether public or private, are the same with those which are recognized in courts of common law, and which have already been considered.[1] But in the former courts there are some further exceptions, and some peculiar illustrations and applications of these rules, which will now be mentioned.

§ 418. Documents peculiar to maritime transactions are those which concern either the ownership and national character of ships and vessels, and the property on board; the contract for seamen's wages and service; the contract for the conveyance of goods by sea; and the log-book, or journal of occurrences on board the ship, relating to her navigation and employment, and the behavior of the seamen.

§ 419. By the law of the United States,[2] the *title to vessels*, whether by absolute bill of sale, mortgage, hypothecation, or other conveyance (except the lien by bottomry created during the voyage), is not valid against any person other than the vendor, his heirs and devisees, or other persons having actual notice thereof, unless the instrument of conveyance is recorded in the office of the collector of customs where the vessel is enrolled or registered.

previous decision in Sills *v.* Brown, 9 C. & P. 601, *contra* seems to be regarded as hasty and unsound. [In England it is usual in cases of collision for the judge to be assisted by some of the masters of the Trinity House as nautical experts, to whom he refers the question of blame under proper instructions as to the law. Though their decision is not binding upon the court, it is usually followed. This practice does not prevail in the United States. It seems, however, to be not unusual to refer the cause to nautical experts to report upon facts within their peculiar knowledge. Peele *v.* Merch. Ins. Co., 3 Mass. 27, 36; The Isaac Newton, 1 Abb. Adm. 588. But in The Clement, 2 Curtis, C. C. 363, it was held that the proper course was to get the opinion of the experts upon a hypothetical case.]

The crews of large ships are distributed into classes, according to their different capacities; and thus the grade of one's seamanship may be ascertained by the station he may have held. The classification is stated in Van Heythuysen's Marine Evidence, p. 9, as follows: —

| | |
|---|---|
| Boatswain's mates, Quartermasters, Gunners and gunners' mates, Forecastle-men | Best men in the ship. |
| Foretop-men, Mizzentop-men | Active young seamen. |
| Maintop-men | Young lads and indifferent seamen |
| After-guards-men, Waisters | Landsmen, &c. |

[1] *Ante*, Vol. 1, §§ 471 – 498, 557 – 582. [* Where a paper has been intrusted to the libellant for the benefit of both parties, the court, on motion of the respondent, will order its production before answer, its inspection being material, as where there is a bipartite agreement, and one part only is reduced to writing and left in the hands of the libellant. But where there was a contract, partly by parol and partly by letters, and one of the letters addressed to the libellant was in his possession, the court refused a motion by the respondent for the production of the letter before answer. The Voyageur de la Mer, Sprague's Decisions, 372.]

[2] United States Stat. 1850, ch. 27, § 1.

But though the *bill of sale* is the proper muniment of title, and is essential to the *complete transfer* of the ownership and of the *national character* of any vessel, and in the ordinary practice in admiralty is always required, as the regular commercial instrument of title,[1] yet, as between the parties themselves, the title may be sustained, at least by way of estoppel, by any evidence competent to prove title to any other personal chattel, under similar circumstances.[2] The *register* is not, *of itself*, evidence of title in the person in whose name it stands, when offered in a suit *against him*, in order to establish his liability as owner;[3] though it would be otherwise, if it were shown that the registry in his name had been procured, or adopted and sanctioned by himself.[4] Nor is it evidence to *disprove* the title of a party claiming as owner, because his name is not found in it; for a legal title may exist, independent of the register.[5] Whether it would be evidence *in his favor* is not known to have been directly decided; but in one case, where a *copy* of the register was rejected, because not made by a certifying officer, no question was raised as to the admissibility of the original, either by the learned counsel, or by the eminent judge who delivered the opinion of the court.[6] In collateral issues, such as in trover, for the materials of a wrecked ship,[7] the title may be proved, *primâ facie*, by possession;[8] and in an indictment for a revolt, the register is sufficient evidence of title to sustain that allegation in the indictment.[9] No vessel, however, can be deemed a

[1] *Ante*, Vol. 1, § 261; 3 Kent, Comm. 130–133; Western *v.* Penniman, 1 Mason, 306; The Sisters, 5 C. Rob. 155; Abbott on Shipping, by Story, pp. 1, 19, 60–66, and notes. In prize courts it is indispensable, in proof of title. The San Jose Indiano, 2 Gall. 284.

[2] Ibid.; Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Taggard *v.* Loring, 16 Mass. 336; Vinal *v.* Burrill, 16 Pick. 401; Wendover *v.* Hogeboom, 7 Johns. 308.

[3] Leonard *v.* Huntington, 15 Johns. 298.

[4] Sharp *v.* United Ins. Co., 14 Johns. 201; Jones *v.* Pitcher, 3 Stew. & Port 135; Tucker *v.* Buffington, 15 Mass. 477; Dunl. Adm. Pract. 283; 3 Kent, Comm. 150; [Flower *v.* Young, 3 Campb. 240; Hacker *v.* Young, 6 N. H. 95. It is not, however, conclusive. Western *v.* Penniman, 1 Mason, 306; Leonard *v.* Huntington, *supra;* Bixby *v.* Franklin Ins. Co. *supra;* Colson *v.* Bonzey, 6 Greenl. 474; Lord *v.* Ferguson, 9 N. H. 380; Ring *v.* Franklin, 2 Hall, 1; Plymouth Cordage Co. *v.* Sprague, 2 Law Rep. 365. Possession seems to be stronger evidence of title than registry. Bass *v.* Steele, 3 Wash. C. C. 381, 390; The S. G. Owens, 1 Wall. Jr. 366. See, further, on the effect of the register as evidence of ownership, Myers *v.* Willis, 33 Eng. Law & Eq. 204, 209, 219; Mitcheson *v.* Oliver, 32 Id. 219; Mackenzie *v.* Pooley, 34 Id. 486.]

[5] Ibid. And see Lord *v.* Ferguson, 9 N. Hamp. 380; Abbott on Shipping, p. 60, note by Story. The register is not necessary to the proof of the national character of an American vessel, even in an indictment for piracy. United States *v.* Furlong, 5 Wheat. 184, 199.

[6] Coolidge *v.* New York Ins. Co., 14 Johns. 308; Abbott on Shipping, p. 63, note by Story. [See Flower *v.* Young, *supra;* Lincoln *v.* Wright, 23 Penn. 76; The S. G. Owens, 1 Wall. Jr. 366.]

[7] Sutton *v.* Buck, 2 Taunt. 302. And see *ante*, Vol. 2, § 378.

[8] Ibid.

[9] United States *v.* Jenkins, 3 Kent, Comm. 130, n.

*vessel of the United States*, or entitled to the privileges of one unless she is *registered*, and the owners and masters are citizens of the United States.[1] But it is only by virtue of statutes that a register becomes necessary, it being a document not required by the law of nations as evidence of a ship's national character.[2] Nor is the register, or the bill of sale, in any case, *conclusive* evidence of ownership.[3]

§ 420. But to this general rule, that the bill of sale is indispensable to a valid title by the admiralty law, an *exception* is allowed, in cases of *judicial sales* by order of a court of admiralty, whether for *wages or salvage*, or upon a forfeiture, or for payment of a loan on *bottomry*. Whether such sale, ordered upon a survey and condemnation as a vessel *unfit for service*, is valid, is a point not perfectly settled; but it has been said that courts of admiralty, feeling the expediency of the power to order sales in such cases, would go far to support the title of the purchaser; and in this country the power has been held to be strictly within the admiralty jurisdiction.[4] A further exception is admitted in cases of condemnation as *prize of war*. In all such cases, the title passes to the purchaser or captor by virtue of the judicial order or sentence and the proceedings thereon, irrespective of any bill of sale or other documentary evidence of ownership.

§ 421. The contract for the conveyance of goods by sea is regularly made by a *charter-party* or agreement in writing, whereby the whole or part of a ship is leased to another, for that purpose, on payment of freight. If the charterer hires the entire ship for the voyage, and has the exclusive possession, command, and navigation of the vessel, he takes the character and responsibilities of a general owner; but if the general owner retains the possession of a part of the ship, with the command and navigation, and contracts to carry a cargo on freight for the voyage, the charter-party

[1] United States Stat. Dec. 31, 1792, §§ 1–5, Vol. 1, pp. 287–290. And see Abbott on Shipping, pp. 31–38, notes by Story; 3 Kent, Comm. 141–150.

[2] *Ante*, Vol. 1, § 494; Le Cheminant *v.* Pearson, 4 Taunt. 367.

[3] Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Colson *v.* Bonzey, 5 Greenl. 474; Hozey *v.* Buchanan, 16 Peters, 215.

[4] The Tilton, 5 Mason, 465, 474; 3 Kent, Comm. 131. A party who claims property in a vessel, derived from a sentence of condemnation by a foreign tribunal, is bound to prove that the tribunal was lawfully constituted. Ordinarily, foreign courts, whose origin is unknown, will be presumed legitimate, until the contrary is proved; but if the court appears to have been constituted by a different authority from what is usual among civilized nations, as, for example, by a military commander, the party claiming under its decree must show that the court was constituted by competent authority. Snell *v.* Faussatt, 1 Wash. C. C. R. 271; 3 Binn. 239, n. S. C.; Cheriot *v.* Foussat, 3 Binn. 220.

is considered a mere contract of affreightment, sounding in covenant, and the freighter does not take the character or legal responsibilities of ownership. But the contract, in either case, is termed a charter-party.[1] By the codes of all the maritime states of Europe, except Great Britain and Malta, it is requisite that this contract should be in writing;[2] and the same rule is understood to prevail in Mexico, and in the states of Central and South America, in which the Ordonanza de Bilbao is recognized as an authority.[3] But in the English law, and that of the United States, the hiring of ships without writing is undoubtedly valid, though disapproved as a loose and dangerous practice.[4]

§ 422. The proper evidence of the shipment of the particular goods to be conveyed, pursuant to the charter-party or contract of affreightment, is the *bill of lading*. This document, though not necessary to the validity of the contract by any express English or American statute, is required by immemorial maritime usage; and is made essential by the codes of most of the maritime states of continental Europe.[5] By the commercial code of France, it is requisite that the bill of lading should express the nature, quantity, and species or qualities of the goods, the name of the shipper, the name and address of the consignee, the name and domicile of the captain, the name and tonnage of the vessel, the place of departure and of destination, the price of the freight; and in the margin, the marks and numbers of the articles or packages shipped; and it is required to be executed in four originals, one each for the shipper, the consignee, the master, and the owner. When thus drawn up, it is legal evidence between all the parties interested in the shipment, and between them and the insurers.[6] A regulation precisely similar in its terms is contained in the codes of Portugal, Prussia, and Holland.[7] In the other continental states the substance only is the same. And, by the general

[1] Marcardier *v.* The Chesapeake Ins. Co., 8 Cranch, 39, 40; The Volunteer, 1 Sumn. 51, 5568; Drinkwater *v.* The Spartan, Ware, R. 156. In cases of doubt upon the face of the charter-party, the general owner is deemed owner for the voyage. Certain Logs of Mahogany, 2 Sumn. 589, 597. [* Under a charter-party giving to the hirer the whole capacity of the ship, the owner thereof is not a common carrier, but a bailee to transport for him. Lamb *v.* Parkman, Sprague's Decisions, 343.]

[2] St. Joseph, Concordance entre les Codes, &c., pp. 69, 70, 265, 287, 307, 333, 366, 405.

[3] Idem, p. 70.

[4] 3 Kent, Comm. 204.

[5] St. Joseph, Concord. pp. 70, 72, 74, 75. Such, by this author, appears to be the law of France, Spain, Portugal, Holland, Prussia, Russia, Hamburg, Sweden, Wallachia, Sardinia, and the Ionian Isles.

[6] Code de Commerce, art. 281, 282, 283. And see Abbott on Shipping, pp. 216, 217, and notes by Story.

[7] St. Joseph, Concord. pp. 72, 75.

maritime law, this document is the proper evidence of title to the goods shipped; if it be made to order, or assigns, it is transferable in the market as other commercial paper, and the indorsement and delivery of it transfers the property in the goods from the time of delivery.[1]

§ 423. Another essential document is the *shipping articles*, or contract for the service and wages of the seamen. The statute of the United States, for the government and regulation of seamen in the merchants' service, requires every master of a vessel bound from the United States to a foreign port, and every master of a vessel of more than fifty tons' burden, bound from a port in one State to a port in any other than an adjoining State, before proceeding on the voyage, to make a written agreement with every seaman on board his vessel, except apprentices and servants of himself or the owners, declaring the voyage or voyages, term or terms of time, for which such seamen shall be shipped. And, at the foot of such contract, there must be a memorandum of the day and hour on which each seaman renders himself on board, to begin the voyage agreed on.[2] Though these shipping articles are signed by all the seamen, no one is understood to contract jointly with or to incur responsibility for any of the others; but the document constitutes a several contract with each seaman, to all intents and purposes.[3] It is part of the necessary documents of the ship for the voyage, and is *primâ facie* evidence in respect to all persons named therein. It is presumed to import verity until impeached by proof of fraud, mistake, or interpolation; and is in no just sense the private paper of the master, but is properly the document of the owner, as well as of the other parties, to which he must be presumed to have access, and of the contents of which he cannot ordinarily be supposed to be ignorant.[4] If it contains any agreement with the seaman contrary to the general maritime law, or to the policy of a statute, as, for example, that the seaman shall pay for medical advice and medicines, without any condition that the ship shall be provided with a suitable medicine-chest; or, that the wages shall cease in case of capture, or during the restraint of the ship; the stipulation will not be allowed to stand, unless an additional compensation be given to the seaman, entire-

[1] 3 Kent, Comm. 207; Abbott on Shipping, p. 389, Story's ed.

[2] U. S. Stat. 1790, ch. 29, §§ 1, 2, Vol. 1, p. 131.

[3] Oliver *v.* Alexander, 6 Pet. 145.

[4] Willard *v.* Dorr, 3 Mason, 161.

ly adequate to the new burdens, restrictions, or risks imposed upon him thereby, or the nature and operation of the clause be fully and fairly explained to him.[1] This document must explicitly declare the ports at which the voyage is to commence and terminate.[2] Parol evidence cannot be admitted to vary the contract, as to the amount of wages;[3] but if the amount is omitted by mistake or accident, and without fraud, either party may be permitted to show, by parol testimony, what was the amount of wages actually agreed upon between them.[4] And the seaman also may show, by parol evidence, that the voyage was falsely described to him at the time of signing the articles;[5] or, that they had been fraudulently altered by the master, since he had signed them.[6] But parol evidence is not admissible on the part of the seaman, to prove an agreement for any additional benefit or privilege, as part of his wages, beyond the amount specified in the shipping articles.[7]

§ 424. Though the statute above cited contains no express declaration respecting the effect of the shipping articles as evidence of the contract, similar to the English statute on that subject,[8] yet

[1] Harden *v.* Gordon, 2 Mason, 541; Brown *v.* Lull, 2 Sumn. 443, 450; The Juliana, 2 Dods. 504; 3 Kent, Comm. 184. And see Mr. Curtis's valuable Treatise on the Rights and Duties of Merchant Seamen, pp. 54–58; Flanders on Shipping, p. 74.

[2] Magee *v.* Moss, Gilp. 219.

[3] Veacock *v.* McCall, Gilp. 305.

[4] Wickham *v.* Blight, Gilp. 452; The Harvey, 2 Hagg. Adm. R. 79.

[5] Murray *v.* Kellogg, 9 Johns. 227; [Page *v.* Sheffield, 2 Curtis, C. C. 377; Snow *v.* Wope, Id. 301.] [* Where the shipping articles were in the usual printed form for whaling voyages, with an additional clause in writing containing novel provisions as to the mode of computing the shares of the seamen, it was held that the seaman was not bound by such new provisions, they not having been made known to him at the time of shipment. Mayshew *v.* Terry, Sprague's Decisions, 584.]

[6] The Eliza, 1 Hagg. Adm. 182.

[7] The Isabella, 2 C. Rob. 241; Veacock *v.* McCall, Gilp. 305. The contrary seems, at first view, to have been held by Judge Peters, in Parker *v.* The Calliope, 2 Pet. Adm. R. 272; but it is to be observed that in that case, which was a libel by the cook for wages, the owner claimed an allowance for the value of the ship's slush, which the cook had sold and appropriated to his own use; and the parol evidence admitted by the judge went to show that the slush was given to the cook, as an admitted perquisite of his place; the evidence being admitted to repel the demand of the owner, as being unjust, and not to support an original claim against him. [In a suit for wages, if the shipping articles are not produced at the trial upon due requirement by the seaman, his statement of their contents will be *primâ facie* evidence thereof. Stat. July 20, 1790, § 6; The Osceola, Olcott, 450.]

[8] By Stat. 2 Geo. 2, c. 36, it was provided that the agreement, "after the signing thereof, shall be conclusive and binding to all parties." The Isabella, 2 C. Rob. 241. These words are regarded as applicable only to the amount of wages, and the voyage to be performed, and not to articles in which the rate of wages is not specified, nor to other stipulations of a special nature; the court of admiralty deeming itself at liberty, on collateral points, to consider how far they are just and reasonable. The Prince Frederick, 2 Hagg. Adm. 394; The Harvey, Id. 79; The Minerva, 1 Hagg. Adm. 374. The English statutes relative to seamen in the merchants' service have been revised, improved, and consolidated by Stat. 5 & 6 W. 4, c. 19.

they have been held to be *the only primary legal evidence of the contract*, on the general principle of the law of evidence;[1] although the charges made on them, of advances to the seamen in the course of the voyage are not sufficient evidence of such payments, until verified by the suppletory oath of the master.[2] But by a subsequent statute, respecting the discharge of seamen in foreign ports,[3] it is, among other things, required that the ship be furnished with a duplicate list of the crew and a certified copy, from the collector of the customs in the place of clearance, of the shipping articles, and that "these documents, *which shall be deemed to contain all the conditions of contract with the crew, as to their service, pay, voyage, and all other things*," shall be produced by the master, and laid before any consul or commercial agent of the United States, whenever there may be occasion for the exercise of his duties under that statute. Such being the effect given by the statute to these certified copies in the cases therein provided for, it is not unreasonable to infer that the originals were understood and intended to have the same effect in all cases. And this inference is supported by another provision, in the previous statute,[4] that in any suit for wages, it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise, the complainant shall be permitted *to state* the contents thereof, and the proof to the contrary shall lie on the master or commander.

§ 425. In the *fisheries*, also, the contract of the seamen with the master and owner is, by statute, required to be in writing, in all cases where the vessel is of the burden of twenty tons and upwards. The writing, in addition to such terms of shipment as may be agreed on, must express whether the agreement is to continue for one voyage or for the fishing season, and that the fish or their proceeds, which may appertain to the fishermen, shall be divided among them in proportion to the fish they respectively may have caught. It must also be indorsed or countersigned by the owner of the vessel or his agent.[5] This statute was not intended to abridge the remedy of the seamen, by the common marine law, against all who were owners of the vessel for the voyage;

[1] Bartlett *v.* Wyman, 14 Johns. 260; Johnson *v.* Dalton, 1 Cowen, 543, 549.

[2] The David Pratt, Ware, R. 496.

[3] U. S. Stat. 1840, ch. 48, § 1, Vol. 5, p. 395.

[4] U. S. Stat. 1790, ch. 29, § 6, Vol. 1, p. 134.

[5] U. S. Stat. 1813, ch. 2, § 1, Vol. 3, p. 2.

and therefore it has been held, that where the articles are not indorsed or countersigned by all the owners, the seaman, in a suit for his share of the proceeds of the fish, may show, by the license, and by parol evidence, who were the real owners of the vessel, and, as such, responsible for the proceeds.[1] In the *whale fishery*, which is held not to be a "foreign voyage," within the meaning of the statutes using that expression, no statute has yet expressly required that the contract should be in writing; but the nature and usage of that trade have led to the universal adoption of a written agreement.[2]

§ 426. If the shipping articles are *lost*, the *rôle d'equipage* is competent evidence of the shipment of the seamen, and of the contract made in relation to wages.[3] For though the articles are held to be the only legal evidence of the contract, in cases where by law they are required and have been executed; yet this does not exclude any competent secondary evidence, where the original is not to be had. If, after the voyage is partly performed, the seamen, at an intermediate port, compel the master to enter into new articles at a higher rate of wages, under threats of desertion in case of his refusal, the new articles are void, as being contrary to the policy of the statute, and tending to sanction a violation of duty and of contract; and the original articles remain in force.[4] Nor is the original contract with the seamen impaired or affected by the death, removal, or resignation of the master, after its execution.[5]

§ 427. It may be added, that in the *interpretation of this contract*, as well as of all other agreements made between seamen and ship-owners or masters, courts of admiralty will take into consideration the disparity of intelligence and of position between the contracting parties, and will be vigilant to afford protection to the seaman; giving him the benefit of any doubt arising upon the contract.[6] They are said to be the "*wards of the admiralty*," "*inopes concilii*," "placed particularly under its protection," in whose favor the law "greatly leans"; and who are "to be treated in the same manner as courts of equity are accustomed to treat

[1] Wait *v.* Gibbs, 4 Pick. 298.
[2] Curtis on Merchant Seamen, p. 60.
[3] The Ketland *v.* Lebering, 2 Wash. C. C. R. 201.
[4] Bartlett *v.* Wyman, 14 Johns. 260.
[5] U. States *v.* Cassidy, 2 Sumn. 582; U. States *v.* Hamilton, 1 Mason, 433; U. States *v.* Haines, 5 Mason, 272.
[6] The Minerva, 1 Hagg. Adm. 355; The Hoghton, 3 Hagg. Adm. 112; The Ada, Daveis, R. 407.

young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees." [1] Hence an acquittance or a general release under seal, executed by a seaman on the payment of his wages, does not, in admiralty, operate as an estoppel, but is treated only as a common receipt, and as *primâ facie* evidence of what it expresses, open to any explanatory or opposing proof which would be received in a court of equity.[2]

§ 428. Another document, universally found on board merchant vessels, and recognized in courts of admiralty, is the *log-book*, or journal of the voyage, and of transactions on shipboard from day to day. It is kept by the master or mate, but usually by the latter; and is of the highest importance in questions of prize, of average, and of seamen's wages, as well as in other particulars.[3] It is evidence in respect to facts relating to the business of lading, unlading, and navigating the ship, the course, progress, and incidents of the voyage, the transactions on shipboard touching those subjects, and the employment and conduct of the crew, but matters totally foreign from these in their character ought not to be entered in the log-book; and, though entered there, must be proved by other evidence. In respect to the general estimation in which it is held in courts of admiralty, it was observed by Lord Stowell, that the evidence of the log-book is to be received with jealousy, where it makes for the parties, as it may have been manufactured for the purpose; but it is evidence of the most authentic kind against the parties, because they cannot be supposed to have given a false rep-

[1] Ibid. The Madonna d'Idra, 1 Dods. 39; The Elizabeth, 2 Dods. 407; Harden *v.* Gordon, 2 Mason, 556; 3 Kent, Comm. 176; Ware, R. 369; Brown *v.* Lull, 2 Sumn. 441. In this last case, Story, J., observed, that "courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from these principles in the articles, as injurious to the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. Seamen are a class of persons remarkable for their rashness, thoughtlessness, and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is, that bargains between them and ship-owners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny, for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned." 2 Sumn. 449.

[2] The David Pratt, Ware, R. 495, 500, 501; Harden *v.* Gordon, 2 Mason, 561, 562; Thomas *v.* Lane, 2 Sumn. 11; Jackson *v.* White, 1 Pet. Adm. R. 179.

[3] Jacobsen's Sea Laws, pp. 77, 91.

resentation with a view to prejudice themselves. The witnesses, when they speak to a fact may perhaps be aware, that it has become a case of consequence, and may qualify their account of past events so as to give a colored effect to it. But the journal is written beforehand, and by persons, perhaps, unacquainted with any intention of fraud; and may therefore securely be relied on wherever it speaks to the prejudice of its authors.[1] The log-book, therefore, is *primâ facie*, evidence of the truth of all matters properly entered therein, in every particular so entered; and to be falsified, it must be disproved by satisfactory evidence.[2] When offered in evidence, it must, of course, be accompanied by proof of its genuineness and identity.[3] Alterations and erasures, apparent on its face, do not necessarily preclude its admissibility in evidence for any purpose, but go in a greater or less degree to impair its value and weight as an instrument of evidence; and in some cases may cause it to be rejected.[4]

§ 429. For certain purposes, proof by the log-book is made indispensably necessary, by the statute for the government and regulation of seamen in the merchants' service. By this statute,[5] it is enacted, that if any seaman shall absent himself from the vessel without leave, and the fact shall be entered in the log-book on the same day, and he shall return to his duty within forty-eight hours, he shall forfeit only three days' pay for each day of absence; but if he shall not return within the forty-eight hours, he shall forfeit all the wages due to him, and all his effects on board the vessel or

[1] The Eleanor, 1 Edw. Adm. 163. And see L'Etoile, 2 Dods. 113. It has been said, that the log-book of the party suing can never be made evidence in his favor, under any shape. The Sociedade Feliz, 1 W. Rob. 311.

[2] Douglass *v.* Eyre, Gilp. 147.

[3] U. States *v.* Mitchell, 2 Wash. C. C. R. 478; 3 Wash. C. C. R. 95; Dunl. Adm. Pr. 268.

[4] Madder *v.* Reed, Dunl. Adm. Pr. 251.

[5] U. S. Stat. 1790, ch. 29, § 5, Vol. 1, p. 133. The enactment is in these words: "that if any seaman or mariner, who shall have subscribed such contract as is hereinbefore described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he will so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them, all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place; and such damages shall be recovered with costs, in any court, or before any justice or justices, having jurisdiction of the recovery of debts to the value of ten dollars, or upwards."

stored on shore at the time, and be further liable to respond in damages to the owner. The effect of this has been to engraft a new rule upon the general maritime law. By that law, desertion of the ship, during the voyage, *animo non revertendi*, and without sufficient cause, connected with a continued abandonment, works a forfeiture of wages. Mere absence without leave, but with an intention of returning, or without such intent, if followed by seasonable repentance and a return to duty, is not followed by the highly penal consequence of such a forfeiture. But the legislature, considering that a longer absence might endanger the safety of the ship or the due progress of the voyage, has made forty-eight hours' absence without leave *conclusive evidence* of desertion, whereas upon the common principles of the maritime law, it would be merely presumptive evidence of it. The fact of *absence without leave* must, however, be entered on the log-book *on the very day* of its occurrence, as an indispensable prerequisite to this statute forfeiture; and hence the log-book becomes the indispensable and only competent evidence of the fact.[1] It is not sufficient merely to state that the seaman was *absent*, or, that he *left* the ship; it must also be stated that it was *without leave*, with the entry of his *name*.[2]

§ 430. But though the log-book is thus made indispensable to the proof of a statute forfeiture of wages, it is not incontrovertible; but the charge of desertion may be repelled by proof of the falsity of the entry, or, that it was made by mistake.[3]

§ 431. In order to admit the log-book in evidence, it ought regularly to be pleaded in the answer. But this rule does not seem to be always strictly enforced. In a suit for wages, a log-book, brought into court by the owners, not pleaded, but asserted to be in the handwriting of the mate, who was the libellant, was permitted to be adverted to, though resisted by the other party.[4] The affidavit of the master, in explanation of the log-book, accompanied by a letter written by him *recenti facto*, has been received.[5] But

[1] Cloutman *v.* Tunison, 1 Sumn. 373, 380; The Rovena, Ware, R. 309, 312, 313; Spencer *v.* Eustis, 8 Shepl. 519. And see Coffin *v.* Jenkins, 3 Story, R. 108; Wood *v.* The Nimrod, Gilp. 83; Snell *v.* The Independence, Id. 140; Knagg *v.* Goldsmith, Id. 207. By the Stat. 7 & 8 Vict. c. 112, § 7, it is incumbent on the owner or master, in such cases, to establish the truth of the entry in the log-book, by the evidence of the mate, or other credible witness.

[2] Abbott on Shipping, p. 468, note by Story; Curtis on Merchant Seamen, pp. 54, 134 – 136; The Rovena, Ware, R. 309, 314.

[3] Orne *v.* Townsend, 4 Mason, 541; Malone *v.* The Mary, 1 Pet. Adm. R. 139; Jones *v.* The Phœnix, Id. 201; Thompson *v.* The Philadelphia, Id. 210; [*The Hercules, Sprague's Decisions, 534.]

[4] The Malta, 2 Hagg. 158, n.

[5] L'Etoile, 2 Dods. 114.

letters written by the master to his owners immediately after a seaman had left the ship, informing them of his desertion, are inadmissible as evidence of that fact;[1] nor will an extract from a police record abroad be received in proof of a mariner's misconduct.[2]

§ 432. There are other documents, admissible in courts of admiralty as evidence in maritime cases, which are required by the laws of particular nations, or by treaties, the consideration of which belongs rather to the general law of shipping than to the law of evidence. Among these may be mentioned the *Sea Letter*, which declares the nationality of the ownership, and commends the vessel to the comity of nations; the *Mediterranean Passport*, required by treaties with the Barbary powers, and intended for protection against their cruisers; the *Certificate of Property;* the *Crew-List*, Muster-Roll, or, *Rôle d'Equipage*, for the protection of the crew in the course of the voyage during a war abroad;[3] the *Inventory* of the ship's tackle, furniture, &c., and of the several ship's papers relative to the voyage, for proof against captors, both of the dismantling of the vessel, and of the destruction or suppression of her documents; and the *Manifest*, *Invoices*, *Certificates of Origin*, and other documentary proofs of the character of the cargo.[4]

4. DEPOSITIONS.

§ 433. The testimony of witnesses in civil causes of admiralty jurisdiction in the courts of the United States is ordinarily received *vivâ voce*, in summary causes, such as those for seamen's wages, and the like; but in those of a graver character, especially if expected to be carried to the supreme court, the evidence is usually taken in depositions, under a commission. The mode of taking depositions, having been stated with sufficient particularity in a preceding volume,[5] will not here be repeated. It should, however, be observed, that there is a clear distinction between depositions taken under a *dedimus potestatem*, and those taken *de bene esse*, under the Judiciary Act of Congress.[6] The provision made in that statute for taking depositions *de bene esse*, without the for-

[1] The Jupiter, 2 Hagg. 221.
[2] The Vibilia, 2 Hagg. 228, n.
[3] U. S. Treasury Circular, Feb. 25, 1815.
[4] See Jacobsen's Sea Laws, Book I. ch. iv. v.; Book III. ch. iv.; Commercial Code of France, art. 226; Arnould on Insurance, 623 – 625.
[5] *Ante*, Vol. 1, §§ 320 – 325.
[6] U. S. Stat. 1789, ch. 20, § 30; Vol. 1, p. 88, Stat. 1793, ch. 22, § 6; Vol. 1, p. 335; *Ante*, Vol. 1, § 322.

mality or delay of a commission, is restricted to the cases there enumerated, namely, when the witness resides more than one hundred miles from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district and more than the above distance from the place, and before the time of trial, or is ancient or very infirm. But whenever a *commission* issues "to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice," whether the witness resides beyond the process of the court or within it, the depositions are under no circumstances to be considered as taken *de bene esse*, but are absolute.[1] The statute provision above mentioned does not apply to cases pending in the supreme court, but only to cases in the district and circuit courts. Depositions can be regularly taken for the supreme court only under a commission issued according to its own rules.[2] Under the statute, it has also been held, that the circumstance that the witness was a seaman in the *naval* service of the United States, and *liable* to be ordered on a distant service, was not a sufficient cause for taking his deposition *de bene esse;* and therefore his deposition was rejected. But it was observed, that in such a case there would seem to be a propriety in applying to the court for its aid.[3]

§ 434. *Objections to the competency* of a deponent should be made at the time of taking his deposition, when it is taken under the statute, in order that the party may have opportunity to remove them if possible. But if the ground of objection was not previously known, either actually or by constructive notice, the objection may be made at the hearing.[4] And when the party, against whom a deposition is taken, expressly waives all objection to it, this general waiver must be understood as extending to the deposition only in the character in which it was taken, and not as imparting to it any new or different character, as an instrument of evidence. Thus, where a deposition is taken *de bene esse*, and the adverse party waives all objection to it, it is still only a deposition *de bene esse*, and does not, by the waiver, become a deposition in chief.[5]

§ 435. The general rules for the conduct of commissioners, parties, and counsel, in taking depositions, are substantially the same in admiralty as in equity. But from the peculiar character of the

[1] Sergeant *v.* Biddle, 4 Wheat. 508.
[2] The Argo, 2 Wheat. 287.
[3] The Samuel, 1 Wheat. 9.
[4] United States *v.* Hair Pencils, 1 Paine, 400.
[5] The Thomas & Henry, 1 Brock. 367.

subjects of jurisdiction, and of the persons and employments of the parties and witnesses, and upon the constant necessity of resorting to foreign countries for proof, courts of admiralty are constrained, for the promotion of justice, to administer those rules of evidence which are not prescribed by statutes with less strictness than is observed in other tribunals. This is illustrated in its frequent resort to letters rogatory, instead of a commission, especially where the foreign government refuses to suffer a commission to be executed within its jurisdiction, and deputes persons, appointed by itself, to take the depositions. In such cases, especially, it will suffice if the testimony sought is substantially obtained from the witness, as far as he is able to testify, though all the interrogatories are not formally answered. Indeed, it is said that, wherever the business is taken out of the hands of the court, the ends of justice seem to require a departure, in some degree, from the ordinary rules of evidence; though the extent to which this departure should go has not yet been precisely determined.[1] So, where an order of the court has been made, pursuant to an agreement of the parties, that the commission for taking testimony should be closed within a limited time; the court, nevertheless, in its discretion, will enlarge the time, upon the proof of newly discovered and material evidence, coming to the knowledge of the party after the execution of the commission.[2]

§ 436. In regard to *affidavits*, it may be here observed, that in instance causes they are seldom of use, except in some cases of salvage,[3] and in matters relating to the progress of the cause. But whenever they are taken, the person preparing the affidavit ought not to make out the statements of fact in language contrary to the natural tone in which the witness or party, if unassisted, would express himself; but should state all the facts and circumstances as the affiant would himself state them if examined in court.[4] As to their admissibility in chief, it has been held that the court will not receive, on the mere affidavit of the defendant, facts which would be a bar to the action;[5] nor will it, upon mere voluntary affidavits, decide upon charges strongly partaking of a criminal na-

[1] Nelson *v.* United States, 1 Pet. C. C. R. 237.

[2] The Ruby, 5 Mason, 451.

[3] In the High Court of Admiralty in England, when cases of salvage are brought upon affidavits, the practice, it seems, is, for the salvors examined first to release their interest. Dunl. Adm. Pr. 265, cites the Countess of Dover, 2 Hagg. 149, 152, n. See *supra*, § 412.

[4] The Towan, 8 Jur. 222.

[5] The Lord Hobart, 2 Dods. 101.

ture.[1] Neither is an affidavit admissible in explanation of depositions and supplying the deficiencies therein; it being either a contradiction or a repetition of the depositions.[2] Nor will the court receive the affidavit of a party in explanation and justification of his conduct in certain proceedings which had appeared in evidence in the cause, and had been animadverted upon by the opposing counsel.[3] The general nature of affidavits, their essential requisites, and their weight and effect, are regarded in all the courts in a manner substantially the same; and these having been already fully explained, under the head of Evidence in Chancery,[4] no further consideration of the subject is here deemed necessary.

[1] The Apollo, 1 Hagg. 315.
[2] The Georgiana, 1 Dods. 399.
[3] Wood *v.* Goodlake, 2 Curt. 97.
[4] See *supra*, §§ 379 – 385.

# CHAPTER III.

## OF PLEADINGS AND PRACTICE IN PRIZE CAUSES.

[*§ 437. District courts of United States have all the powers of prize courts.
438. Duty of captor *carefully to preserve all* the papers and writings found on board the prize, and to transmit the *whole* to the judge of the district to which prize is ordered to proceed.
439. Commissioners of prize take examinations *in preparatorio* of master and persons on board captured ship.
440. Captors must proceed forthwith to an adjudication of property captured.
441. Allegations in libel.
442. Claim to the property must be made by owner himself, if within jurisdiction.
443. In doubtful cases a full year allowed for claimants to come in.]

§ 437. We have already seen[1] that the district courts of the United States are clothed with all the powers of prize courts, as recognized in the law of nations. The mode in which these powers are exercised, so far as it is peculiar to prize causes, will now briefly be considered.

§ 438. Upon the capture of a vessel, as prize of war, it is the duty of the captor *carefully to preserve all the papers and writings found on board the prize*, and to transmit *the whole* of the originals, unmutilated, to the judge of the district to which the prize is ordered to proceed; without taking from the prize any of the money or other property found on board, unless for its better preservation, or unless it is absolutely necessary for the use of vessels of the United States.[2] The delivery of the papers is accompanied by an affidavit that they are delivered up in the same condition in which they were taken, without fraud, addition, subduction or embezzlement. And the master, and one or more of the principal persons belonging to the captured vessel, are also to be brought

1 *Supra*, § 387.

2 Stat. 1800, ch. 33, § 1, Vol. 2, p. 46; Articles for the Government of the Navy, arts. 7, 8; Wheat. on Captures, p. 208. The Practice in Prize Causes is ably, though somewhat succinctly, treated in the Appendix to 1 Wheaton's Reports, Note II., and 2 Wheaton's Reports, Note I., usually attributed to Mr. Justice Story.

in for examination.[1] It is an ancient and fundamental rule of prize proceedings, that the master, at least, of the captured ship should be brought in, and examined upon the standing interrogatories, as well as that the ship's papers should accompany the property brought before the court. The omission to do this must be accounted for in a very satisfactory manner, or the court will withhold its sentence, even in very clear cases.[2] The duty of an *immediate* delivery of the papers is equally stringent, and every deviation from it is watched with uncommon jealousy. They cannot, in any case, be returned to the captors; but the custody of them belongs to the court alone.[3] Nor are the captors permitted to decide upon the materiality of the papers to be preserved and brought in; but it is their duty to produce all which are found; the determination of their value and relevancy is for the court, at the hearing.[4]

§ 439. It is the practice of courts of admiralty and prize, in time of war, to appoint *commissioners of prize*, to take the examinations, *in preparatorio*, of the master and persons on board the captured ship, and to perform such other duties respecting the captured property as may be specially assigned to them under the rules and orders of the court. These officers are duly commissioned and sworn. They are ordinarily charged with the custody of the prize, in the first instance, and until further proceedings are had.[5]

§ 440. It is the duty of the captors forthwith to proceed to the adjudication of the property captured, by filing a *libel* and obtaining a *monition* to all persons claiming an interest in the property, to appear at a day assigned, and show cause why a decree of condemnation should not be passed. If they omit or unreasonably delay thus to proceed, any person, claiming an interest in the prize, may obtain a monition against them, requiring them to proceed to adjudication; which if they fail to do, or fail to show sufficient cause for condemnation of the property, it will be restored to the claimants, on proof of their interest therein.[6]

§ 441. When the capture is made by a national ship, the *libel*

[1] Wheat. on Captures, p. 280; 1 Wheat. 495, 496.

[2] The Arabella, 2 Gall. 370; The Flying Fish, Id. 374; The Speculation, 2 C. Rob. 293; The Anna, 5 C. Rob. 375 [333], 385 [347], n.; The Dame Catharine, Hay & Mar. 244.

[3] The Diana, 2 Gall. 93, 95.

[4] The London Packet, 2 Gall. 20.

[5] Wheat. on Captures, App. pp. 312, 369.

[6] Wheat. on Captures, p. 280.

is filed by the district attorney, in behalf of the United States and of the officers and crew of the capturing ship.[1] It briefly alleges, in distinct articles, first, the existence of the war; secondly, the name and rank of the commanding officer of the capturing ship, and of the ship then under his command; thirdly, the time and fact of the capture, as having been made on the high seas, with the name and general description of the vessel or property captured; fourthly, the national character of the prize, showing it to be enemies' property; fifthly, that the prize is brought into a certain port in the district and within the jurisdiction of the court; sixthly, that by reason of the premises, the property has become forfeited to the United States and the captors, and ought to be condemned to their use; and lastly, praying process, and monition, and a decree of condemnation of the property, as lawful prize of war.[2] When the capture is made by a privateer, or by private individuals, the captors employ their own proctor, and the libel is filed by the commander of the privateer, in behalf of himself and crew, or by one or more of the individual captors, in behalf of all.

§ 442. If a *claim* to the property is interposed, it should be made by the owner himself, if within the jurisdiction, and not by his agent; the captors being entitled, in that case, to the answer of each claimant, severally, upon his oath.[3] It must be accompanied by a test affidavit, stating that the property, both at the time of its shipment and at the time of capture, did belong, and, if restored, will belong to the claimant; but an irregularity in this respect, in a case otherwise fair and free from suspicion, will not be deemed fatal.[4] In general, the claimant must make his claim and affidavit, without being assisted by the papers in shaping them; and if they be found substantially to agree with the documents, he will afterwards be permitted to correct any formal errors from

[1] [The suit should properly be brought in the name of the United States; but the objection that it is brought in the name of the captors is merely formal and cannot be first taken on appeal. Jecker *v.* Montgomery, 18 How. 110. See also Proceeds of Prizes, 1 Abb. Adm. 495. And when the proceeds of prizes have been brought into court, the parties entitled thereto may file libels in their own names. Ib.]

[2] See the precedent in Wheat. on Captures, App. No. VII. The Fortuna, 1 Dods. 81. [The captor is not confined to the case on which the seizure was made; but may obtain condemnation on a different ground, if the facts warrant it. Schacht *v.* Olter, 33 Eng. Law & Eq. 28.] [* The libel need not allege for what cause a vessel has been seized, or has become prize of war. It is enough to allege the capture generally as prize of war. The Andromeda, 2 Wallace, U. S. R. 481.]

[3] The Lively, 1 Gall. 315, 337; The Sally, Id. 401; The Adeline, 9 Cranch, 286. [The claim must be made by all the owners, equitable as well as legal. The Ernst Merck, 33 Eng. Law & Eq. 594.]

[4] The Adeline, 9 Cranch, 244, 286.

the documents themselves. But in special cases, where a proper ground is laid by affidavits, an order will be made for an examination of such papers as are necessary to the party to make a proper specification of his own claim, but not for a general examination of all the ship's papers.[1] It is also a general rule, that no claim shall be admitted in opposition to the depositions and the ship's papers. But the rule is not inflexible; it admits of exceptions, standing upon very particular grounds, in cases occurring in times of peace or at the very commencement of war, and granted as a special indulgence. But in times of known war, the rule is never relaxed.[2] Neither will a claim be admitted, where the transaction, on the part of the claimant, was in violation of the laws of his own country, or is forbidden by the law of nature.[3]

§ 443. Where *no claim is interposed*, if the property appears to belong to enemies, it is immediately condemned. If its national character appears doubtful, or even neutral, the court will not proceed to a final decree, but will postpone further proceedings, with a view to enable any person, having title, to assert it within a reasonable time; and this, by the general usage of nations, has been limited to *a year and a day*, that is, to a full year, after the institution of the prize proceedings. If no claim is interposed within that period, the property is deemed to be abandoned, and is condemned to the captor for contumacy and default of the supposed owner.[4] In fine, the end of a prize court, as was said by Lord Mansfield, is to suspend the property until condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis velatis*, if, upon the most summary examination there does not appear sufficient ground to condemn; but if the goods really are prize, to condemn finally, against everybody, giving everybody an opportunity of being heard. A captor may, and must, force every person interested to defend; and every person interested may force him to proceed to condemnation without delay.[5]

[1] The San Jose Indiano, 2 Gall. 269; The Port Mary, 3 C. Rob. 233.

[2] The Diana, 2 Gall. 93, 96, 97; The Vrow Anna Catherina, 5 C. Rob. 15, 19 [20, 24]; La Flora, 6 C. Rob. 1.

[3] The Washington Packet, 2 W. Rob. 77, 83. And see 1 Wheat. App. Note II. p. 501, and cases there cited.

[4] The Harrison, 1 Wheat. 298; The Staat Embden, 1 C. Rob. 26, 29.

[5] Lindo *v.* Rodney, 2 Doug. 641, n.

# CHAPTER IV.

## OF EVIDENCE IN PRIZE CAUSES.

[*§ 444. Examinations of captured master and crew taken on standing interrogatories.
445. This preparatory examination confined to persons on board the prize. Restrictions in regard to it.
446. Manner of taking it.
447. Testimony upon which cause is first tried.
448. Rule, that evidence in first instance must come from papers and crew of captured vessel, sometimes, and how far, relaxed.
449. In cases of *joint* or *collusive capture*, other evidence sometimes admitted.
450. Utmost despatch required in completing preparatory examination.
451. Documents found on board the prize admissible in evidence, whatever their character. Other documents governed by general rules of evidence.
452. Title to ship proved only by *bill of sale*.
453. Circumstances tending to condemn a ship.
454. No person incompetent from interest.
455. Commissions rarely sent to take evidence in an enemy's country.
456. Official declarations of a foreign state to a certain extent admissible.
457. Other testimony besides the preparatory examination taken as in other cases of admiralty jurisdiction.
458. Presumptions in prize courts.
459. Possession is presumptive evidence of ownership.
460. Public ships of war *actually in sight* or associated together by public authority, presumed to assist in capture.
461. Persons presumed to belong to the country in which they have their domicile.]

### 1. IN PREPARATORIO.

§ 444. THE prize being brought in, and all the papers found on board being delivered into court, and notice thereof being given by the captors to the judge, or to the commissioners of prize, the next thing forthwith to be done is, to take *examinations* of the captured master and crew, upon the *standing interrogatories*. This is seldom done by the judge, in person, but is usually performed by the commissioners, by his order. The standing interrogatories are prepared under the direction of the judge, and contain sifting inquiries upon all points which may affect the question of prize;

of which those used in the high court of admiralty in England are understood to furnish the most approved model, and are similar to those adopted in the practice in prize causes in the United States.[1]

§ 445. This preparatory examination is *confined to the persons on board the prize*, at the time of capture, unless the special permission of the court is obtained for the examination of others.[2] And, in order to guard as far as possible against frauds and misstatements from after-contrivances, the examination should take place as soon as possible after the arrival of the vessel, and without permitting the witnesses to have intercourse with counsel. The captors, also, should introduce all the witnesses in immediate succession, and before any of the depositions are closed and transmitted to the judge; for after the depositions are taken and transmitted, the commissioners are not at liberty, without a special order, to examine other witnesses subsequently adduced by the captors.[3] The same rule is, with equal strictness, applied to the conduct of the claimants. Thus, when a person calling himself the supercargo of the prize, produced himself before the commissioners two days after the vessel came into port, and offered papers in his possession, they refused to examine him, because the testimony was not offered immediately; and the judge confirmed their decision.[4] The ship's papers and other documents found on board and not delivered to the judge or the commissioners, previous to the examinations, will not be received in evidence.[5]

§ 446. In regard to the *manner of the examination*, though it is upon standing interrogatories, and the witnesses are not allowed the assistance of counsel, yet they are produced in the presence of the parties or their agents, before the commissioners, whose duty it is to superintend the regularity of the proceeding, and to protect the witnesses from surprise or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him, and then becomes evidence common to both parties.[6] It is the duty of the commissioners, not merely

[1] 1 Wheat. 495. The English interrogatories are printed at large in 1 C. Rob. 381–389. Those used in the United States may be found in 2 Wheat. App. pp. 81–87.

[2] 1 Wheat. 496; The Eliza & Katy, 1 C. Rob. 189, 190; The Henrick & Maria, 4 C. Rob 57; The Haabet, C. Rob. 54, 55; The Fortuna, 1 Dods. 81.

[3] The Speculation, 2 C. Rob. 293; 1 Wheat. 496, 497.

[4] The Anna, 1 C. Rob. 331.

[5] Ibid.; 1 Wheat. 497, 498; The Ann Green, 1 Gall. 281.

[6] The Apollo, 5 C. Rob. [286], 256, 257.

to require a formal direct answer to every part of an interrogatory, but to require the witness to state the facts with such minuteness of detail as to meet the stress of every question, and not to evade a sifting inquiry by vague and obscure statements.[1] To prevent fraudulent concert between the witnesses, they are examined apart from each other. And if a witness refuses to answer at all, or to answer fully, the commissioners are to certify the fact to the court; in which case the witness will be liable to be punished for the contempt, and the claimants will incur the penal consequences to the ship and cargo, resulting from a suppression of evidence. As soon as the examinations are completed, they are to be sealed up, directed to the judge of the district, and transmitted to the clerk's office, together with all the ship's papers which have not already been lodged there by the captors.[2]

§ 447. It is upon this *preparatory testimony*, consisting of the ship's papers, the documents on board, and the depositions thus taken, that *the cause is, in the first instance, to be heard and tried.*[3] And in weighing this evidence, the master and the crew of the captured ship are ordinarily regarded as having no interest in the condemnation of the vessel, but on the contrary as being concerned to defend their employers; and as having a natural prepossession in favor of their employment, and therefore as being most favorably inclined to the side of the claimant. If there is a repugnance between the depositions and the documents, it does not necessarily follow that the conviction of the court must be kept *in equilibrio* until it can receive further proof; for though such is the general rule in courts of admiralty, yet it is a rule by no means inflexible; but it is liable to many exceptions, sometimes in favor of depositions, and sometimes, though more rarely, on the side of the documentary evidence; the preponderance being determined by the court, upon a consideration of all the circumstances of the case.[4] It is, however, to be observed, that the captured property itself, being before the court, constitutes a part, and often an essential part, of the original evidence upon which the cause is in the first instance to be tried; affording, in many cases, a certainty which no papers can give. Whenever, therefore, a proper foundation is laid, the court will direct a survey, in order to ascertain

[1] The Ann Green, 1 Gall. 273, 284.
[2] 1 Wheat. 498.
[3] The Vigilantia, 1 C. Rob. 1, 4; The Ann Green, 1 Gall. 281, 282; 1 Wheat. 498; The Liverpool Packet, 1 Gall. 516; 2 Browne, Civ. & Adm. Law, p. 451.
[4] The Vigilantia, *supra*.

the nature and character of the property in question, or will otherwise satisfy itself on the point, by proof.[1]

§ 448. But this *rule* of the law of prize, that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel, also admits of some *relaxation;* by allowing the captors, under peculiar circumstances, to adduce extrinsic testimony. Thus, depositions and documents may sometimes be *invoked from another cause*, and *papers found on board other ships* may sometimes be admitted, and in some other cases of reasonable doubt or pregnant suspicion, the captors will not be excluded from the benefit of diligent inquiries. But no papers ought to be admitted *as coming from the ship*, which are not produced at the first examination.[2] Thus, where a ship had been stopped and searched, and a letter had been taken out by the cruising vessel, and the ship being afterwards captured and libelled as prize, it was prayed by the captors that this letter might be introduced on further proof, the court refused to admit it; the learned judge observing, that it was by no means the disposition of the court to encourage applications of this kind; that it had seldom been done, except in cases where something appeared in the original evidence to lead to further inquiry; and not where the matter was foreign and not connected with the original evidence in the cause, but tended to lead the practice of the court from the simplicity of prize proceedings, and to introduce an endless accumulation of proof.[3]

§ 449. In cases of *joint* or *collusive capture*, also, the simplicity of prize proceedings is necessarily departed from; and where, in these cases, circumstances of doubtful appearance occur, the court will permit the parties to adduce other evidence than that which is furnished from the captured vessel, or is invoked from other prize causes.[4]

[1] The Liverpool Packet, 1 Gall. 513, 520. And see the Carl Walter, 4 C. Rob. 207, 213; The Richmond, 5 C. Rob. [325], 290, 294; The Jonge Margaretha, 1 C. Rob. 189, 191.

[2] The Ann Green, 1 Gall. 274, 282; 1 Wheat. 499; The Apollo, 5 C. Rob. 256; The Vriendschap, 4 C. Rob. 166; The Nied Elwin, 1 Dods. 54. But see The Romeo, 6 C. Rob. 351. It *seems* that papers cannot be invocated, except when the cause is either between the same parties, or on the same point. Applications for the invocation of proceedings from another cause have been rejected. See Dearle *v.* Southwell, 2 Lee, 93. In another case, the rule was stated to be, that original evidence, and depositions taken on the standing interrogatories, may be invoked from one prize cause into another; but depositions taken as further proof in one cause cannot be used in another. The Experiment, 4 Wheat. 84.

[3] The Sarah, 9 C. Rob. 330; cited and approved in The Liverpool Packet, 1 Gall. 516. But see The Romeo, 6 C. Rob. 351; *Infra*, § 463.

[4] The George, 1 Wheat. 408. The rea-

§ 450. In regard to the *time within which the preparatory examination must be completed*, no particular period seems to be definitely fixed by the general admiralty law; it being only required that in this, as in all other prize proceedings, the utmost despatch be observed. But, by the English law, the judge or commissioners are to finish the examination within five days after request made for that purpose.[1] This period has been mentioned by some

sons for this relaxation of the rule were thus explained by Marshall, C. J.: "It is certainly a general rule in prize causes that the decision should be prompt; and should be made, unless some good reason for departing from it exists, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. This rule ought to be held sacred in that whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. If the captured vessel be plainly an enemy, immediate condemnation is certain and proper. But the vessel and cargo may be neutral, and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not to be increased by prolonging his detention, in the hope that something may be discovered from some other source which may justify condemnation. If his papers are all clear, and if the examinations *in preparatorio* all show his neutrality, he is, and ought to be, immediately discharged. In a fair transaction this will often be the case. If anything suspicious appears in the papers, which involves the neutrality of the claimant in doubt, he must blame himself for the circumstance, and cannot complain of the delay which is necessary for the removal of those doubts. The whole proceedings are calculated for the trial of the question of prize or no prize, and the standing interrogatories on which the preparatory examinations are taken are framed for the purpose of eliciting the truth on that question. They are intended for the controversy between the captors and the captured; intended to draw forth everything within the knowledge of the crew of the prize, but cannot be intended to procure testimony respecting facts not within their knowledge. When the question of prize or no prize is decided in the affirmative, the strong motives for an immediate sentence lose somewhat of their force, and the point to which the testimony *in preparatorio* is taken, is no longer the question in controversy. If another question arises, for instance, as to the proportions in which the owners and crew of the capturing vessel are entitled, the testimony which will decide this question must be searched for, not among the papers of the prize vessel, or the depositions of her crew, but elsewhere, and liberty must therefore be given to adduce this testimony. The case of a joint capture has been mentioned, and we think, correctly, as an analogous case. Where several cruisers claim a share of the prize, extrinsic testimony is admitted to establish their rights. They are not, and ought not to be, confined to the testimony which may be extracted from the crew. And yet the standing interrogatories are, in some degree, adapted to this case. Each individual of the crew is always asked whether, at the time of capture, any other vessel was in sight. Notwithstanding this, the claimants to a joint interest in the prize are always permitted to adduce testimony drawn from other sources to establish their claim. The case before the court is one of much greater strength. The captors are charged with direct and positive fraud, which is to strip them of rights claimed under their commissions. Even if exculpatory testimony could be expected from the prize crew, the interrogatories are not calculated to draw it from them. Of course, it will rarely happen that testimony taken for the sole purpose of deciding the question whether the captured vessel ought to be condemned or restored, should furnish sufficient lights for determining whether the capture has been *bonâ fide* or collusive. If circumstances of doubtful appearance occur, justice requires that an opportunity to explain those circumstances should be given; and that fraud should never be fixed on an individual until he has been allowed to clear himself from the imputation, if in his power

"Under these impressions, the case must be a strong one; indeed, the collusiveness of the capture must be almost confessed, before the court could think a refusal to allow other proof than is furnished by the captured vessel justifiable." 1 Wheat. 409–411.

[1] 2 C. Rob. 295, note (*a*).

writers as the general rule,[1] and it certainly is in accordance with the principle just mentioned.

### 2. DOCUMENTS.

§ 451. As to the *admissibility of documents* in prize causes, those found on board the prize are of course admitted, from that circumstance alone, whatever may be their character; they being part of the *mainour*, so to speak, with which the prize was taken. The admissibility of other documents is determined by the general rules of evidence heretofore considered. And the same distinction is to be observed respecting the *proof of documents;* those found on board the captured vessel being admitted, *primâ facie*, without other proof of their genuineness than the fact of their having been there found and the verification of them by the master of the ship;[2] while the proof of other papers is governed by the other rules above referred to.

§ 452. It is of course expected that every ship has on board the *proper and usual documents*, showing her *national character and ownership*, and the *innocent nature of her employment;* and that these are carefully preserved, and readily submitted to the inspection of the captors. These documents have been described, in considering the documentary evidence in instance causes.[3] But the proof of title, for obvious reasons, is required with more strictness in prize proceedings than in others; and hence the legal title of the ship can be asserted in the prize court only as to those persons to whom it is conveyed by the *bill of sale*, irrespective of any equitable interest claimed by others; the court looking singly to the bill of sale, the document recognized by the law of nations, and decisive of the ownership. If, by this document, the vessel stands as enemy's property, it is condemned as such, leaving equitable interests, if any exist, to other jurisdictions.[4] And so important is the production of this document deemed, that its absence alone, according to the constant habits of the admiralty court, founds a demand on the party for further proof.[5]

§ 453. The grand circumstances which, as Dr. Browne observes,[6] if proved, go strongly to condemn the ship, or at least to

[1] 2 Browne, Civ. & Adm. Law, p. 446; Jacobsen's Sea Laws, p. 405.
[2] The Juno, 2 C. Rob. 122.
[3] *Supra*, §§ 417–432.
[4] The San Jose Indiano, 2 Gall. 284. And see The Sisters, 5 C. Rob. [155], 138; The Vigilantia, 1 C. Rob. 1.
[5] The Welavart, 1 C. Rob. 122.
[6] 2 Browne, Civ. & Adm. L. p. 451.

excite strong suspicion, relate chiefly to this documentary evidence. Among these are said to be, — the *want* of complete and proper papers; the carrying of *false* or *colorable* papers; the *throwing overboard* of papers; *prevarication* of the master and officers in their testimony *in preparatorio; spoliation* of papers; the *inability* of the master to *give an account* of the ownership; the master's own *domicile* and national character; his *conduct*, and that of the vessel; the *time* when the papers were drawn and executed, and whether before or after the existence of the war. It has already been seen[1] that the presumption from the *spoliation of papers* arises more readily in the admiralty courts than in other tribunals, and is administered with greater stringency and freedom; but in prize causes this stringency is exhibited with more vigilance and force than in those on the instance side of the court. Neutral masters are held to be not at liberty to destroy papers; and if they do so, the explanation that they were mere private letters will not be received.[2] The act alone was ground of condemnation, by the law of nations; and this rule is said to be administered in the French and other continental courts, to the extent of the principle; but in the British prize courts the rule is modified to this extent, that if all other circumstances are clear, this alone shall not be damnatory, if satisfactorily accounted for; as, for example, if it were done by a person with intent to promote private interests of his own.[3] A similar modification of the rule, in principle, is admitted in the United States.[4]

### 3. COMPETENCY OF PROOF.

§ 454. It has already been stated, in regard to witnesses in the instance court,[5] that the objection of their competency, on the score of interest, was generally held valid, as it is at common law. But in the prize court, from the nature of the subjects in judgment, it is obvious that this rule must necessarily be subject to many and large exceptions. The practice in the high court of admiralty in England prior to the recent statute on this subject seems not to have been perfectly uniform, though apparently inclining against allowing the objection of interest to prevail, upon

[1] *Supra*, § 408.
[2] The Two Brothers, 1 C. Rob. 133.
[3] The Hendrick & Alida, Hay & Mar. 106; The Hunter, 1 Dods. 480. And see The Maria Magdalena, Hay & Mar. 247; The Rising Sun, 2 C. Rob. 104.
[4] The Pizarro, 2 Wheat. 227.
[5] *Supra*, § 414.

the question of capture.[1] But in the United States it has been clearly held, that the common-law doctrine as to competency is not applicable to prize proceedings; and that in prize courts, no person is incompetent as a witness merely on the ground of interest; but the testimony of every witness is admissible, subject to all exceptions as to its credibility; and accordingly, upon an order for further proof, where the benefit of it is allowed to the captors, their attestations have been held clearly admissible.[2] The testimony of the master, officers, and crew of the captured ship is also admissible, in all stages of the cause, on the same principle. But where a neutral ship was captured for a breach of blockade, and a question arises from the destination of the ship, though in other cases the court is disposed to give great attention to the evidence of the master and mate, their testimony, in this case, will not be deemed entitled to any advantageous preference. For, if there was a fraudulent design to evade the blockade, the master, and probably the mate also, as his accomplice, must have been the principal agents; and therefore, where they speak of the situation of the vessel, their testimony must be outweighed by that of the common seamen, unless there is reason to suspect that these have been debauched by the captors.[3]

§ 455. It is, however, contrary to the practice of the prize court, to send a commission to take evidence in an enemy's country;[4] not that an alien enemy is in all cases and universally disabled as a witness; but that the cases of exception are few. Thus, an American resident in France, during a war between France and Great Britain, and therefore subject, in England, to all the disabilities of a French merchant as to the power of becoming a claimant in a prize proceeding, was nevertheless deemed not incompetent as a witness, on that account.[5]

§ 456. The *official declarations of a foreign state* are also, to a certain extent, admissible in evidence. Thus, in the case of a demand for salvage on an American vessel, recaptured from a Spanish cruiser, which had taken her as prize on the ground that she was bound to Malta, then a belligerent port, with a cargo of provi-

[1] The Maria, 1 C. Rob. 340, 353; The Drie Gebroeders, 5 C. Rob. 307, note (*a*); The Galen, 2 Dods. 21; The Catherine of Dover, 2 Hagg. 145.

[2] The Anne, 3 Wheat. 435, 444. And see The Grotius, 9 Cranch, 368.

[3] The James Cook, 1 Edw. Adm. R. 261.

[4] The Magnus, 1 C. Rob. 35; The Diana, 2 Gall. 97.

[5] The Falcon, 6 C. Rob. 197.

sions and naval stores; a document under the seal and sign-manual of the President of the United States, declaring that the cargo was the property of the United States, and destined for the supply of its squadron in the Mediterranean, was held admissible in proof of that fact. The learned judge on that occasion observed, that great respect is due to the declaration of the government of a State; not to the extent, which has sometimes been contended for, that the convoy of a vessel of the State, or public certificates that the goods on board are the property of its subjects, should at once be received as sufficient to establish that fact, and to supersede all further inquiry; because it is very possible for governments to be imposed on with regard to facts of that nature, which they can take only on the representation of interested individuals. But when there is an averment like this, *relative to their own immediate acts*, it would be a breach of the comity and respect due to the declarations of an independent State, to doubt the truth of an assertion which could not have been made but upon a thorough knowledge and conviction of the fact.[1]

#### 4. MODE OF TAKING TESTIMONY.

§ 457. We have seen that the preparatory examinations, in prize causes are ordinarily taken before the commissioners of prize, upon the standing interrogatories, and sometimes, though rarely, before the judge. Other testimony is taken in the mode usual in other cases of admiralty and maritime jurisdiction, which has been sufficiently stated. But in the supreme court of the United States, in all cases of admiralty and maritime jurisdiction where new evidence may be admissible, the testimony of witnesses must be taken under a commission, issued from that court, or from any circuit court under the direction of a judge thereof, upon interrogatories and cross-interrogatories duly filed; but the rule does not prevent any party from giving oral testimony in open court, in cases where by law it is admissible.[2] No other seal is necessary to be affixed by the commissioners to their return, than the seal to the envelope.[3]

#### 5. PRESUMPTIONS.

§ 458. In prize courts there are certain *presumptions* which le-

[1] The Huntress, 6 C. Rob. 110.
[2] Rules of the Supreme Court, Reg. 27; Adm. Pract. 255. The London Packet, 2 Wheat. 371.
[3] Grant *v.* Naylor, 4 Cranch, 228; Dunl.

gally affect the parties, and are considered of general application, and which therefore deserve particular notice in this place. These relate chiefly to the ownership of the property, the national character of the ship, and the domicile and nationality of the master and claimants.

§ 459. In regard to the *title* and *ownership*, possession is presumptive evidence of property, and therefore justifies the capture of ships and cargoes found in the enemy's possession, though it may not always furnish sufficient ground for condemnation.[1] If, upon further proof allowed to the claimant, there is still a defect of evidence to show the neutral character of the property, it will be presumed to belong to the enemy.[2] Goods, found in an enemy's ship, are presumed to be enemy's property, unless a distict neutral character and documentary proof accompany them.[3] Where a ship has been captured and carried into an enemy's port, and is afterwards found in the possession of a neutral, the presumption is, that there has been a regular condemnation, and the proof of the contrary rests on the claimant against the neutral possessor.[4] Ships are presumed to belong to the country under whose flag and pass they navigate; and this, although purchased by a neutral, if they are habitually engaged in the trade of the enemy's country; even though there be no seaport in the territory of the neutral.[5] This circumstance is held conclusive upon their character, against the claimant; he being not at liberty to deny the character which he has worn for his own benefit and upon the credit of his own oath or solemn declaration. But it is not conclusive against others; for these are still at liberty to show that the documentary and apparent character of the ship was fictitious, and assumed for purposes of deception.[6] So, the produce of an enemy's colony is conclusively presumed to be enemy's property, so far as the question of prize is concerned, whatever the local residence of the true owner of the soil may be; and accordingly, the

[1] The Resolution, 2 Dall. 19, 22. [*See Prize Cases, 2 Black. U. S. R. 635.]

[2] Wheat. on Captures, App. p. 312; The Magnus, 1 C. Rob. 31, 35.

[3] 2 Wheat. R. App. p. 24; [*The Sally Magee, 3 Wallace U. S. R. 451.]

[4] The Countess of Lauderdale, 4 C. Rob. 283; 2 Wheat. App. p. 25.

[5] The Vigilantia, 1 C. Rob. 1, 15; The Vrow Anna Catharina, 5 C. Rob. 144, 150; 2 Wheat. App. p. 28.

[6] The Fortuna, 1 Dods. 87; The Success, Id. 131; 2 Wheat. App. p. 30. [Or that the transfer, under which the apparent ownership is in the enemy, was merely colorable. The Ocean Bride, 33 Eng. Law & Eq. 576. In case of an alleged sale to a neutral just before the war, the court will require full proof of the sale, value, price, and payment. The Ernst Merck, 33 Eng. Law & Eq. 594. See also The Soglaizie, Ib. 587.]

claim of a neutral German to the produce of a plantation descended to him in a belligerent Dutch colony was rejected.[1]

§ 460. In questions of *joint capture*, also, there is an important presumption in prize law, in favor of public ships of war; it being generally and with few exceptions presumed that all such ships *actually in sight* were assisting in the capture, and therefore are entitled to a share in the prize.[2] And the benefit of this presumption is extended to all ships associated together by public authority; as, for example, in a blockading squadron; though they were not *all* in actual sight at the moment of the capture.[3] But in the case of a claim of joint capture by a private vessel, this presumption is not admitted; but the claimant must prove actual intimidation, or actual or constructive material assistance.[4] The reason of this distinction is, that public ships are under a constant obligation to attack the enemy and capture his ships wherever seen; and it is presumed that the performance of this duty is always intended; but privateers are under no such obligation, their commissions being taken for mere purposes of private gain by plunder, which they are at liberty to pursue or not, at their pleasure. And in regard to public ships in sight, the presumption may be repelled by proof that the ship, claiming as joint captor, had discontinued the chase, and changed her course, in a direction inconsistent with any intent to capture; or by proof of other circumstances plainly and openly inconsistent with such design.[5]

§ 461. As to the question, *who are to be considered enemies or not*, the presumption is, that every person belongs to the country in which he has a domicile, whatever may be the country of his nativity or of his adoption.[6] And the masters and crews of ships are deemed to possess the national character of the ships to which they belong, during the time of their employment.[7] A neutral consul, resident and trading in a belligerent country, will be presumed and taken, as to his mercantile character, to be a bel-

[1] The Phœnix, 5 C. Rob. 25; The Vrow Anna Catharina, Id. 144, 150; Boyle et al. *v.* Bentzon, 9 Cranch, 191.

[2] The Dordrecht, 2 C. Rob. 55, 64; The Robert, 3 C. Rob. 194.

[3] The Forsigheid, 3 C. Rob. 311, 316; La Flore, 5 C. Rob. 239; 2 Wheat. App. p. 60.

[4] [The same rule applies to revenue cutters as to privateers. The Bellona, Edw. 63.]

[5] See 2 Wheat. App. pp. 60 – 67, where this subject is treated more fully, and the cases are cited.

[6] The Indian Chief, 3 C. Rob. 12, 22; The President, 5 C. Rob. 248; The Ann Green, 1 Gall. 274; The Venus, 8 Cranch, 253. See 2 Wheat. App. 27.

[7] The Embden, 1 C. Rob. 16; The Endraught, Id. 22; The Bernon, Id. 102; 2 Wheat. App. p. 28.

ligerent of that country.[1] Although a person goes into a belligerent country originally for a temporary and special purpose only, yet if he continues there during a substantial part of the war, and beyond the time necessary to disengage himself, contributing, by the payment of taxes and other means, to the strength of that country, the original and special purpose of his coming will not suffice to repel the presumption of his hostile character.[2]

[1] The Indian Chief, 3 C Rob. 22.

[2] The Harmony, 2 C. Rob. 322. The subject of belligerent character arising from mercantile domicile is further pursued in 2 Wheat. App. pp. 27 – 29.

## CHAPTER V.

### OF FURTHER PROOF.[1]

[*§ 462. Further proof, besides ship's papers and preparatory examination, admitted or ordered in the discretion of the court.

463. Further proof rarely ordered by the court itself, unless doubt arises from the evidence already in the cause.

464. Claimant admitted to further proof in cases of reasonable doubt, where his conduct appears fair; his own affidavit indispensable.

465. Court is reluctant to allow further proof to captors.

466. Further proof will be refused to the claimant where he has been guilty of misconduct, forfeiting the indulgence of the court. Illustrations.

467. Further proof must be in documents and depositions.]

§ 462. The cause having been heard, upon the ship's papers and the preparatory examinations, if upon such hearing it still appears doubtful, it is in the discretion of the court to allow or require further proof, either from the claimants alone, or equally from them and the captors.[2] In some cases it is required by the court, for its own relief from doubt; in others, it is allowed to the party, to relieve his case from suspicion; and it may be restricted to specific objects of inquiry. It may be ordered upon affidavits and other papers, introduced without any formal allegations, which is the more modern and usual mode, introduced for the sake of convenience; or it may be ordered *upon plea and proof*, according to the more ancient course; in which case the cause is opened to both parties, *de novo*, upon new and distinct allegations.[3] Plea and proof has been termed "an awakening thing"; admonishing parties of the difficulties of their situation, and calling for all the proof which their case can supply.[4] When further proof is

[1] See, on this subject, 1 Wheat. App. Note I.; 2 Wheat. App. Note II.

[2] [*The Sally Magee, 3 Wallace U. S. R. 452.] Further proof is not peculiar to prize causes. The court will order it on the instance side, in a revenue cause, where the evidence is so contradictory or ambiguous as to render a decision difficult. The Samuel, 1 Wheat. 9.

[3] The Minerva, 1 W. Rob. 169.

[4] The Magnus, 1 C. Rob. 33. And see 2 Browne, Civ. & Adm. L. p. 453; The Ariadne, 1 C. Rob. 313; The Sally, 1 Gall. 403.

allowed to the claimants, in the ordinary mode, the captors are not permitted to contradict, by affidavits, the testimony brought in; counter-proof on the part of the captors being admissible only under the special direction of the court.[1]

§ 463. Further proof may be *ordered by the court itself*, upon any doubt arising from any quarter; whether the doubt arises solely from the evidence already in the cause, or is raised by circumstances extrinsic to that evidence. But this is rarely done upon the latter ground, unless there is also something in the original evidence which suggests further inquiry. Thus, where a vessel was stopped and searched by a ship of war, and a letter, disclosing the hostile character of the vessel, was found on board and was transmitted by the searching officer, officially, to the king's proctor, after which the vessel, being permitted to proceed, was captured and sent in by another cruiser; this letter, under the circumstances, was allowed to be introduced on further proof.[2] Where the case is perfectly clear, and not liable to any just suspicion, upon the original evidence, the court is not disposed to favor the introduction of extraneous matter, or to permit the captors to enter upon further inquiries.[3] And where further proof is ordered by the court expressly with respect to the property and destination of the ship on the return voyage, and it is accordingly furnished by the claimants, the captors will not be permitted to argue for a condemnation on a new ground disclosed by the further proof, but the court will confine all objections to the points already designated for further investigation.[4]

§ 464. In cases of reasonable doubt, the court will *admit the claimant to further proof*, where his conduct appears fair, and is not tainted with illegality.[5] It is the privilege of honest ignorance, or honest negligence, to neutrals who have not violated the law of neutrality; as, for example, for the absence of a bill of sale of a ship purchased in the enemy's country.[6] So, where the bill of lading is unaccompanied by any invoice or letter of advice, the neutral claimant may be admitted to further proof, even though the ship and the residue of the cargo were belligerent, and the

[1] The Ariadne, 1 C. Rob. 313.

[2] The Romeo, 6 C. Rob. 351. But in a prior case, an application nearly similar was refused. The Sarah, 3 C. Rob. 330; *Supra*, § 448. And see The Liverpool Packet, 1 Gall. 525; The Bothnea & Janstoff, 2 Gall. 78, 82.

[3] Ibid.; The Alexander, 1 Gall. 532

[4] The Lydiahead, 2 Acton, 133.

[5] The Bothnea & Janstoff, 2 Gall. 82.

[6] The Welvaart, 1 C. Rob. 123, 124.

master had thrown papers overboard.[1] Further proof will also be allowed to the claimant, where the captors have been guilty of irregularity, in not bringing in the papers, or the master of the captured ship.[2] But where further proof is allowed the claimant, proof by his own affidavit is indispensably necessary, as to his proprietary interest, and to explain the circumstances of the transaction; and the absence of such proof and explanation always leads to considerable doubt.[3] If, upon an order for further proof, the party disobeys or neglects to comply with its injunctions, such disobedience or neglect will generally be fatal to his claim.[4]

§ 465. In *allowing further proof to captors*, the court is more reluctant, and sparing in its indulgence; rarely allowing it when the transaction appears unsuspicious upon the preparatory testimony; and never, unless strong circumstances or obvious equity require it. And in such cases it is admissible only under the special direction of the court; which can never be obtained where the captors have been guilty of gross misconduct, gross ill-faith, or gross negligence, the attendant of fraud; or where the case does not admit of a fair explanation on their side; for the court will not trust with an order for further proof those who have thus shown that they mean to abuse it.[5]

§ 466. An order for further proof will also be *refused to the claimant*, where he has been guilty of culpable neglect, or of bad faith, or other misconduct, justly forfeiting his title to this indulgence from the court. Thus, it has been refused to the shippers in a hostile ship, who had neglected to put on board any documentary evidence of the neutral character of the shipment.[6] So, where a neutral had fraudulently attempted to cover and claim as his own an enemy's interest in the captured property, and afterwards applied for the admission of further proof as to his own interest in the same property.[7] So, where there has been a con-

[1] The Friendschaft, 3 Wheat. 14, 48.

[2] The London Packet, 1 Mason, 14.

[3] The Venus, 5 Wheat. 127; La Nereyda, 8 Wheat. 108, 171.

[4] La Nereyda, *supra*. [The claimant will not be allowed, upon further proof, to contradict his own testimony, in the preparatory examination, as to domicile or national character. El Telegrafo, 1 Newb. 383.] [* The *claimant* may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered; and such an order may also be made in the supreme court of the United States. The making of it anywhere is controlled by the circumstances of each case. It is made with great caution, because of the temptation it holds out to fraud and perjury. It is made only when the interests of justice clearly require it. The Sally Magee, 3 Wallace U. S. R. 459.]

[5] The Bothnea & Janstoff, 2 Gall. 78, 82; The George, Id. 249, 352.

[6] The Flying Fish, 2 Gall. 374.

[7] The Betsey, 2 Gall. 377. And see The Merrimack, 8 Cranch, 317; The Graaf Bernstoff, 3 C. Rob. 109; The

cealment of material papers;[1] or, a fraudulent spoliation or suppression of papers;[2] or, where the ship purchased of the enemy has been left, in the management of the former owner, in the enemy's trade;[3] or, was captured on a return voyage, with the proceeds of her outward cargo of contraband goods, carried under false papers for another destination;[4] or, where the goods were actually shipped for neutral merchants, between enemy's ports, but with a colorable destination to a neutral port;[5] or, where any other gross misconduct is proved against the claimants, or the case appears incapable of fair explanation;[6] or, the further proof is inconsistent with that already in the case;[7] or, the case discloses *mala fides*, on the part of the claimant.[8]

§ 467. As to the *mode of taking testimony* in cases of further proof, it is to be observed, that mere oral testimony is never admitted; but the evidence must be in documents and depositions, taken in the manner already mentioned. In the Supreme Court of the United States it is taken upon commissions alone.[9]

Eenrom, 2 C. Rob. 15; The Rosalie & Betty, Id. 343, 359; [The Ida, 29 Eng. Law & Eq. Rep. 574.]

[1] The Fortuna, 3 Wheat. 392.

[2] The St. Lawrence, 8 Cranch, 434. But if the master should suppress papers relating solely to his own interest, this will not affect the claim of the owners. The Rising Sun, 2 C. Rob. 108.

[3] The Jenny, 4 C. Rob. 31.

[4] The Nancy, 3 C. Rob. 122.

[5] The Carolina, 3 C. Rob. 75.

[6] The Vrow Hermina, 1 C. Rob. 163, 165; The Hazard, 9 Cranch, 209; The Pizarro, 2 Wheat, 227.

[7] The Euphrates, 8 Cranch, 385; The Orion, 1 Acton, 205. But that this rule is not inflexible, see La Flora, 6 C. Rob. 1.

[8] The Juffrouw Anna, 1 C. Rob. 126.

[9] The George, 2 Gall. 249, 252; Rules of the Supreme Court, Reg. 25, 27; *Supra*, § 457.

# PART VIII.

# OF EVIDENCE

IN

# COURTS MARTIAL.

# PART VIII.

## OF EVIDENCE IN COURTS MARTIAL.

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## CHAPTER I.

### PRELIMINARY OBSERVATIONS.

[* § 468. Distinction between *military law* and martial law defined.
469. Tribunals of both are bound by the common-law rules of evidence.
470. The law presumes nothing in favor of a court martial.
471. Accusation ought to be drawn with the essential precision and distinctness required in an indictment at common law.
472. Accusation is composed of *charges* and *specifications*.
473. Defendant may answer by a *plea to the jurisdiction*, a *plea in bar*, and by the general plea of *not guilty*.
474. Judge advocate conducts prosecution in the name of the United States. Other duties.
475. Military and naval courts of inquiry in the United States have a legal constitution and authority. The extent of the same.]

§ 468. In entering upon the subject of evidence in courts martial we are led first to observe the *distinction* between *martial law* and that which is commonly, and for the sake of this distinction, termed *military law*. The difference between them relates more directly to the subjects of jurisdiction, but in its results it affects the rules of evidence. In the language of Lord Loughborough, "where *martial law* prevails, the authority under which it is exercised claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to inquiry by a military authority; every species of offence, committed by any person who appertains to the army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs."[1]

[1] Grant *v.* Gould, 2 H. Bl. 98.

It extends also to a great variety of cases not relating to the discipline of the army, such as plots against the sovereign, intelligence to the enemy, and the like.[1] It is "founded on paramount necessity, and is proclaimed by a military chief"; and when it is imposed upon a city or other territorial district, all the inhabitants and all their actions are brought within the sweep of its dominion.[2] But *military law* has its foundation and limits in the statutes for establishing rules and articles for the government of the army and navy, and in the instructions and orders issued by the executive magistrate pursuant thereto, and in virtue of his authority as Commander-in-Chief. Its jurisdiction extends only to those who are a *part of the army*, in its various grades and descriptions of persons; and it is limited to *breaches of military duty*.[3] These breaches of duty are in many instances strictly defined; particularly in those cases which are fatally or highly penal; but in

[1] Whether persons not belonging to the army can properly be subjected to martial law has been seriously doubted. See the opinion of Mr. Hargrave, in Rowe's Reports, p. xliv. In the more limited view of its extent, *martial law* applies only to military persons, but reaches all their transactions, whether civil or military; while *military law* is restricted to transactions relating to the discipline of the army. It seems, however, to be generally conceded, that persons, taken in open rebellion against the government, may lawfully be tried and punished by martial law; so that the point principally in dispute is, whether persons can be tried by that law for acts of rebellion committed long previous to their arrest. This point was much discussed in Ireland, in the case of Cornelius Crogan, who was condemned and executed by the sentence of a military court, for having been concerned in the rebellion of 1798, without having been taken in arms. His offence was that of acting as commissary of supplies. See Rowe's Rep. pp. 1–142.

[2] [* The Duke of Wellington said, in the House of Lords, on the 1st April, 1851, in reference to the Ceylon rebellion of 1849, "that martial law was neither more nor less than the will of the general who commands the army; in fact, martial law is no law at all." And Earl Grey, on the same occasion, said, "that he was glad to hear what the noble Duke had said with reference to what is the true nature of martial law, for it is exactly in accordance with what I myself wrote to my noble Lord Torrington, at the period of those transactions in Ceylon. I am sure I was not wrong in law, for I had the advice of Lord Cottenham, Lord Campbell, and the attorney-general (Sir J. Jervis), and explained to my noble friend, that what is called proclaiming martial law is no law at all, but merely for the sake of public safety, in circumstances of great emergency, setting aside all law, and acting under the military power." Finlayson on Martial Law, Preface, vii.; Parl. Deb. 1851, Ceylon.]

[3] Where an officer was charged with scandalous and infamous conduct, 1st, in submitting tamely to imputations upon his honor, and 2dly, in attempting to seduce the wife of another officer; and was acquitted upon the first specification, but was found guilty of the fact in the second, but acquitted of the charge of "scandalous and infamous conduct, unbecoming an officer and a gentleman"; the sentence was disapproved and set aside, on the ground that the fact itself, in the latter specification, devested of all connection with the discipline of the army, was not a subject of military cognizance. Case of Capt. Gibbs, Simmons on Courts Martial, pp. 439–441. But where the fact itself involves a breach of military discipline, such as striking an inferior officer, and using opprobrious language towards him, though the party is acquitted of the charge of "scandalous and infamous conduct, unbecoming an officer and a gentleman," yet he may well be sentenced under the specification. Case of Lt. Dunkin, Simmons, pp. 442, 443.

many others it is impossible more precisely to mark the offence than to call it a neglect of discipline.[1]

§ 469. It is thus apparent, that while *martial law* may, or does, in fact, assume cognizance of matters belonging to civil as well as to criminal jurisdiction, *military law* has respect only to the latter. The tribunals of both are alike bound by the common law of the land in regard to the rules of evidence, as well as other rules of law,[2] so far as they are applicable to the manner of proceeding; but courts martial when administering the military law, having cognizance only of criminal offences, are bound by the rules of evidence administered in criminal cases in the courts of common law; and therefore ought not to convict the prisoner until all reasonable doubt of his guilt is removed; allowing the presumption of innocence, in all cases, to operate in his favor;[3] whereas, when taking cognizance, under martial law, of matters of merely civil conduct, such as the non-payment of debts, or the like, they are at liberty to decide according to the preponderance of testimony on either side.[4] The obligatory force of the common law of evidence was solemnly recognized in England, in the case of the mutineers in the ship *Bounty*. These men were tried by a court martial at Portsmouth; and there being no evidence against one of the prisoners, he was offered as a witness on behalf of another of them, who insisted on the right to examine him; the court, however, by advice of the judge advocate, refused to permit him to be examined, saying that the practice of courts martial had always been against it; and the prisoner was condemned to death. But upon

[1] 2 H. Bl. 100; 1 McArthur on Courts Martial, pp. 33 – 37; 1 Kent, Comm. 341, note; Wolton *v.* Gavin, 15 Jur. 329; 16 Ad. & El. 48, N. S.; Mills *v.* Martin, 19 Johns. 7, 20 – 22; Smith *v.* Shaw, 12 Johns. 257.

[2] "The act for punishing officers and soldiers by martial law has only laid down such rules for the proceedings of courts martial as were intended to differ from the usual methods, in the ordinary courts of law; it is therefore natural to suppose that, where the act is silent, it should be understood that the manner of proceeding at courts martial should be regulated by that of the other established courts of judicature." Adye on Courts Martial, p. 45.

[3] 2 McArthur, pp. 52, 54. [* Martial law is a *Lex non Scripta*, it arises on a paramount necessity to be judged of by the Executive. Martial law comprises all persons. All are under it in the country or district in which it is proclaimed, whether they be civil or military. There is no regular practice laid down in any work on military law, as to how courts martial are to be conducted, or power exercised under martial law; but, as a rule, I should say that it should approximate as near as possible to the regular forms and course of justice, and the usage of the service, and that it should be conducted with as much humanity as the occasion may allow, according to the conscience and the good judgment of those intrusted with its execution." *Vide* Ev. of Sir D. Dundas, Judge-Advocate-General, before the Ceylon Committee, 1849 – 50. Finlayson on Martial Law, 383.]

[4] *Supra*, § 29; Adye, pp. 45, 48, 97 – 116.

the sentence being reported to the king, execution was respited until the opinion of the judges was taken; and they all reported against the legality of the sentence, on the ground of the rejection of legal evidence, and the prisoner thereupon was discharged.[1]

§ 470. A court martial is a court of limited and special jurisdiction. It is called into existence by force of express statute law, for a special purpose, and to perform a particular duty; and when the object of its creation is accomplished, it ceases to exist. The law presumes nothing in its favor. He who seeks to enforce its sentences, or to justify his conduct under them, must set forth affirmatively and clearly all the facts which are necessary to show that it was legally constituted, and that the subject was within its jurisdiction. And if, in its proceedings or sentence, it transcends the limit of its jurisdiction, the members of the court, and its officer who executes its sentence, are trespassers, and as such are answerable to the party injured, in damages, in the courts of common law.[2]

§ 471. It is not proposed here to describe the course of practice and forms of proceeding in courts martial, except so far as they may respect the rules of evidence; and this is chiefly in the form of the complaint or accusation. These proceedings being of a criminal character, the party accused is *entitled*, by the Constitution of the United States, "*to be informed of the nature and cause*

[1] Muspratt's case, 2 McArthur, 158; 1 East, R. 312, 313. And see Stratford's case, Ibid.; Simmons on Courts Martial, pp. 485–487; *Ante*, Vol. 1, §§ 358, 363; Home *v.* Bentinck, 2 B. & B. 130. See also Capt. Shaw's trial, *passim*.

[2] Wise *v.* Withers, 3 Cranch, 331, 337; Duffield *v.* Smith, 3 S. & R. 590; Mills *v.* Martin, 19 Johns. 7, 32; Smith *v.* Shaw, 12 Johns. 257, 265; Brooks *v.* Adams, 11 Pick. 442; The State *v.* Stevens, 2 McCord, 32. [A sailor in the United States navy was complained of before a court martial for desertion. He was acquitted of that charge, but found guilty of an attempt to desert, and sentenced to imprisonment. The sentence was approved by the Secretary of the Navy and executed by the United States marshal by order of the President. In an action brought against the marshal for false imprisonment, it was *held*, that the offence was within the jurisdiction of the court martial, that the validity of its proceedings in a case within its jurisdiction could not be inquired into elsewhere, and that the marshal was protected by his warrant. Dynes *v.* Hoover, 20 How. 65.]

[* "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course; as necessity creates the rule, so it limits its duration; for if *this government* is continued, *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." Davis, J. *Ex-parte* Milligan *et al.*, Supreme Court of the United States, Dec. Term, 1866.]

*of the accusation*" against him; and this, not in general terms, but by a particular statement of all that is material to constitute the offence, set forth with reasonable precision and certainty of time and place, and in the customary forms of law. In other words, the accusation ought to be drawn up with all the essential precision, certainty, and distinctness which the prisoner is entitled to demand in an indictment at common law; though it needs not to be drawn up in the same technical forms; the same reasons applying alike in both cases.[1] Hence, in a charge of *mutiny*, it is essential to state that the act was done in a *mutinous* or *seditious manner;* in a charge of *murder*, it is necessary to state that the prisoner, of his *malice aforethought*, feloniously *murdered* the deceased; as is required in an indictment for that crime;[2] and so in all other offences at common law; but in prosecutions for other offences, the practice is to adopt the language of the statute or article in which they are described, with a sufficient specification of the act constituting the offence.[3]

§ 472. The *accusation*, in courts martial, which stands in place of the indictment in courts of common law, is composed of *charges* and *specifications*. The office of the *charge* is to indicate the nature of the offence, and the article of war under which it falls; and, therefore, it generally is either couched in the language of the article itself, or is stated in general terms, as a violation of such an article, mentioning its number. The former mode is regarded as most proper, and, therefore, is usually pursued; especially where the article includes various offences, or is capable of violations by various and different actions. The latter is allowable only where the article describes a single offence, in which no mistake can be made.[4] The *specification* states the name and rank of the prisoner, the company, regiment, &c., to which he belongs, the acts which he committed, and which are alleged to constitute the offence, with the time and place of the transaction; and where the essence of the offence consists in hurting or injuring the person or property of another, the name and description of the person injured should be stated, if known; and if not, then it should be alleged to be unknown.[5] If the prosecutor is unable precisely to

[1] See *supra*, § 10; Kennedy on Courts Martial, pp. 31, 32; 2 McArthur on Courts Martial, pp. 8, 9.

[2] See *supra*, § 130.

[3] 2 McArthur on Courts Martial, pp. 8, 9.

[4] O'Brien on Military Law, p. 233.

[5] O'Brien, p. 234; *Supra*, §§ 12, 22. The specification, like a bill in equity, should state the *fact* to be proved, but not the *evidence* by which the fact is to be proved. See Whaley *v.* Norton, 1 Vern. 483.

state the time and place of the offence, he may charge that the fact was committed at or near such a place, and on or about such a time. But this is not to be permitted, if it can possibly be avoided without the sacrifice of justice, as it tends to deprive the prisoner of some advantage in making his defence.[1] In fine, though courts martial, as has just been observed, are not bound to all the technical formalities of accusation that prevail in courts of law, yet they are bound to observe the essential principles on which all charges and bills of complaint ought to be framed, in all tribunals, whether civil, criminal, or military; namely, that they be sufficiently specific in the allegations of time, place, and facts, to enable the party distinctly to know what he is to answer, and to be prepared to meet it in proof at the trial, and to enable the court to know what it is to inquire into and try, and what sentence it ought to render, and to protect the prisoner from a second trial for the same offence.[2]

[1] Kennedy, p. 32.

[2] See Simmons on Courts Martial, p. 151; *Ante*, Vol. 2, § 7; Kennedy, p. 31; Army Regulations, Art. 87. The nature of the accusation, in courts martial, may more clearly appear from the following precedents: —

1. *On Army Regulations, Art.* 5.

Accusation against Lieutenant A. B. of —— regiment (or —— corps) of the army of the United States.

*Charge.*

Using contemptuous words against the President of the United States.

*Specification.*

For that Lieutenant A. B. of —— regiment (&c.) did use the following contemptuous words against the President of the United States, or (*if in conversation*) words of similar import: namely (*here specify the words*). Said words being used by him in a conversation (*or speech, address, writing, or publication, as the case may be*) held (*delivered or published, &c.*) at or near ——, on or about the —— day of ——, A. D. 18— (*or otherwise describe the publication*). (See O'Brien, p. 296.)

2. *On Navy Regulations, Art.* 13.

Charges and specifications thereof, preferred against Captain J. S. of the navy of the United States, by Captain J. H. of said navy.

*Charge* 1*st.*

Treating with contempt his superior officer, being in the execution of the duties of his office.

*Specification* 1*st.*

For that the said Captain J. S. on or about the —— day of ——, in the year ——, being then in command of the United States ship ——, lying in the harbor of ——, did write and send a contemptuous letter to Captain J. H., commandant of the Navy Yard at ——, of the purport following: to wit.

(*Here the letter is set forth.*)

Thereby imputing to him unworthy motives in (*here stating the injurious tendency and meaning of the letter*). (See Captain Shaw's Trial, p. 4.)

It has been said, that where the party is accused of having used disrespectful or insulting language, the words themselves ought not to be set forth in the specification, because this would suggest to the prosecutor's witnesses the testimony expected from them, and be equivalent to asking them leading questions. See Kennedy, p. 33. But it may be observed, on the other hand, that to omit this would deprive the prisoner of the precise information of the nature of the accusation to which he is justly entitled in order to prepare his defence. It is, however, to be remembered, that where the language is profane or obscene, the law does not require it to be precisely stated, but, on the

§ 473. The *prisoner's answer* to the accusation may be by a special *plea to the jurisdiction* of the court; as, for example, that it has been improperly or illegally detailed; or, that it is not composed of the requisite number of officers; or, that the offence is purely of civil and not of military cognizance; or, that he is not of a class of persons amenable to its jurisdiction. Or, he may answer by a *plea in bar;* such, for example, as that the period of time, within which a prosecution for the offence might be commenced, has already elapsed; or, that he had once been legally tried for the same offence; or, that the proper authority had officially engaged that, on his becoming a witness for the government against an accomplice for the same offence, he should not be prosecuted. And if these pleas are overruled, he still may put the allegations in issue by the general plea of *not guilty;* in the same manner as in criminal courts, on the trial of an indictment.[1]

§ 474. The *judge advocate*, or some person deputed to act in his stead for the occasion, conducts the prosecution in the name of the United States; but he is required so far to consider himself as counsel for the prisoner, after the prisoner has pleaded to the accusation, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself.[2]

§ 475. *Courts of inquiry*, in England, are not regulated by any statute, nor by any standing regulation, but depend on the will of the sovereign, or of the superior officer convoking the court, both as to the officers who may compose it, and as to every particular of its constitution. It is not a judicial body, but is rather a council; having no power to compel the attendance of witnesses not of the army or navy, as the case may be, nor to administer oaths; nor is any issue formed which it is competent to try.[3] But in the American military and naval service, these courts have a legal constitution and authority. Military courts of inquiry may be ordered by the general or commanding officer, consisting of one, two, or three officers, and a judge advocate or other suitable person as a recorder, all of whom are sworn. They have the same powers

contrary, does require that its nature be indicated only in general and becoming terms. In other cases, the injury above alluded to by Mr. Kennedy may be prevented, by omitting to read the specification in the hearing of the witness. See Simmons, pp. 462, 463.

[1] Maltby on Courts Martial, pp. 53–60; 2 McArthur, pp. 26, 27; O'Brien on Military Law, pp. 247–251.

[2] Army Regulations, Art. 69.

[3] Simmons, pp. 95–99; 1 McArthur, pp. 107–118; *Infra*, § 498.

as courts martial to summon witnesses and to examine them on oath; and the parties accused may cross-examine the witnesses.[1] Naval courts of inquiry may be ordered by the President of the United States, the Secretary of the Navy, or the commander of a fleet or squadron; and are constituted and empowered in the same manner.[2] The proceedings of these courts are authenticated by the signatures of the president of the court and of the judge advocate; and in all cases not capital, nor extending to the dismission of an officer, in the army, nor of a commissioned or warrant officer, in the navy, they are admissible in evidence, provided that oral testimony of the facts cannot be obtained.[3]

[1] Army Regulations, Art. 91.
[2] U. S. Stat. 1800, ch. 33, § 2, Art. 1, Vol. 2, p. 51.
[3] Army Regulations, Art. 92; U. S. Stat. 1800, ch. 33, § 2, Art. 2, Vol. 2, p. 51.

# CHAPTER II.

## OF EVIDENCE IN COURTS MARTIAL.

[* § 476. Only exceptions to the common-law rules of evidence in courts martial are those created by necessity.

477. Evidence in favor of the prisoner's character always received, and particular instances in which his conduct has been approved may be shown.

478. *Opinions* of witnesses more frequently called for in military trials than in any others.

479. Prisoner may show that the fact was done by another, not a party to the trial.

480. Sufficient if the substance of the issue be proved.

481. Allegations of time and place need not be strictly proved, unless to maintain jurisdiction.

482. Rule requiring best evidence same as at common law.

483. Exceptions same as at common law. Illustrations.

484. Common-law rules of presumption applied.

485. Common-law power to compel attendance of witnesses. Practice.

486. Witnesses must be sworn, but the manner may admit of question.

487. Rules as to *competency of witnesses* same as at common law.

488. Disqualification of witness proved as in other courts. Desertion not in legal estimation an infamous crime.

489. Practice as to fellow-prisoners testifying for each other, where several are joined in the same prosecution.

490. Witnesses are examined in open court, with few exceptions.

491. And ordinarily apart from one another, but subject to the discretion of the court.

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1. GENERAL RULES.

§ 476. It has already been intimated, that courts martial are bound, in general, to observe the rules of the law of evidence by which the courts of criminal jurisdiction are governed. The only exceptions which are permitted are those which are of necessity created by the nature of the service, and by the constitution of the court, and its course of proceeding. Thus, the rule respecting the *relevancy of evidence*,[1] prohibits the court martial from receiving any evidence of matters not put in issue by the charge, or which would implicate the prisoner in a new and distinct offence, or in a degree or extent of guilt not appearing in the charge on which he is arraigned.[2] This rule, however, does not forbid inquiry into circumstances which, though collateral, and not mentioned in the specifications, yet have a direct bearing on the matter charged; as, for example, on a charge of larceny of specified goods, the fact that other goods, stolen at the same time and from the same place, were found in the prisoner's possession, unaccounted for, may be shown, for the purpose of identifying the prisoner as the person who stole the missing goods.[3] So, also, on a charge of desertion, the essence of which depends on the intention not to return, evidence is admissible that the prisoner, on the night of his departure, committed a highway robbery, for which he had been tried and convicted.[4] The circumstances of the robbery might be irrelevant; but the fact of the crime, proved by the record of his conviction, would warrant the inference that he did not intend to return. On the same principle, on a charge of using contemptuous, disrespectful, or unbecoming language towards his commanding officer at a stated time, or in a particular letter, evidence that the accused at other times used similar language on the same subject, is admissible, in proof of his intent and meaning in the language specified in the accusation.[5]

§ 477. In regard to the admissibility of *evidence of the prisoner's character*, when offered by himself, courts martial do not appear to have felt any of the doubts which criminal courts have sometimes entertained; but, on the contrary, it has ever been their practice, confirmed by a general order, to admit evidence in favor of the prisoner's character, immediately after the production of his own

[1] *Ante*, Vol. 1, § 50.
[2] Simmons, p. 420; Kennedy, p. 52.
[3] Simmons, p. 422. And see *ante*, Vol. 1, §§ 52, 53.
[4] Ibid.
[5] Simmons, p. 423; *Supra*, § 168. And see *ante*, Vol. 2, § 418.

proofs to meet the charge, whatever may be its nature; and even to permit him to give in evidence particular instances in which his conduct has been publicly approved by his superiors. But the prosecutor has no right to impeach the prisoner's character by evidence, unless by way of rebutting the evidence already adduced by the prisoner himself;[1] much less will the prosecutor be permitted to give evidence in chief, as to the prisoner's general habits of life, in order to show that he has a general disposition to commit offences of the kind of which he is accused. The prisoner, on the other hand, may always meet the charge by evidence of his own habits of life and traits of character, of a nature opposed to the commission of any offence of that kind; as, for example, in answer to a charge implicating his courage, he may prove his character for personal bravery and resolution.

§ 478. The *opinions* of witnesses are perhaps more frequently called for in military trials than in any others; but the rule which governs their admissibility is the same here as elsewhere, and has already been stated in a preceding volume.[2] But it is proper here to add, that where the manner of the act or of the language with which the prisoner is charged is essential to the offence, as, whether the act was menacing and insulting, or cowardly or unskilful, or not, or whether the language was abusive, or sarcastic, or playful, the opinion which the witness formed at the time, or the impression it then made upon his mind, being contemporaneous with the fact, and partaking of the *res gestæ*, is not only admissible, but is a fact in the case which he is bound to testify. But in cases of military science, affecting the prisoner, and depending on a combination of facts which are already in testimony before the court, and upon which every member of the court is competent, as a military officer, to form an opinion for himself, it is deemed hardly proper to call upon a witness to state his opinion, nor is he bound to give it if called for.[3] It is, however, perfectly proper to put questions involving opinion, to an engineer, as to the progress of an attack, or to an artillery officer, as to the probable effect of his arm, if directed in a certain assumed manner; such questions, though belonging to military science, not being presumedly within the knowledge of every member of a court martial.[4]

[1] Simmons, pp. 427 – 429; Kennedy, p. 61; O'Brien, p. 191. And see *supra*, §§ 25, 26; *Ante*, Vol. 1, §§ 54, 55.

[2] *Ante*, Vol. 1, §§ 440, 441, 576, 580, n.

[3] See Admiral Keppel's trial, 2 McArthur, pp. 135 – 146; General Whitelocke's Trial, Id. 147 – 154.

[4] Simmons, p. 433.

§ 479. Testimony is sometimes admissible, which goes to implicate a third person who is not a party to the trial; as, for example, where it is essential to the prisoner's own justification that he should show that the fact was done by another, and not by himself, such testimony will be received, notwithstanding it may tend to criminate one who is a stranger to the proceedings.[1]

§ 480. The rule, that it is *sufficient if the substance of the issue or charge be proved*,[2] without requiring proof of its literal terms, is also applied in courts martial in the same manner as at common law. Thus, where a prisoner is charged with the offence of desertion, and the proof is merely that he was absent without leave; the latter fact is the substance of the issue, constituting in itself an offence sufficient to warrant a conviction; the motive and design, which raise it to the crime of desertion, being only concomitants of the act. So, on a charge of offering violence to a superior officer, by discharging a loaded musket at him while in the execution of his office; the prisoner may be convicted and punished on proof of the fact of violence, though it be not proved that he had any knowledge of the rank or authority of the officer; the principal fact being the violence offered, and the rank and authority of the officer being circumstances of aggravation. So, also, where an officer is charged with behaving in a scandalous and infamous manner, unbecoming the character of an officer and a gentleman; and the facts specified and proved do of themselves constitute a breach of military discipline and good order, but the charge of scandalous and ungentlemanly conduct is not supported by the evidence; yet enough is proved to justify a conviction and sentence for the minor offence involved in the specification.[3] But if the facts stated in the specification do not of themselves constitute a breach of discipline, or fall within military cognizance, and the imputation of scandalous and ungentlemanly conduct is not proved, the prisoner must be acquitted.[4]

§ 481. The *allegations of time and place* generally need not to be strictly proved. But if the jurisdiction of the court is limited to a particular territory, the offence must be alleged and proved to have been committed within that territory; and the like strictness of allegation and proof is necessary, where the prosecution is

[1] Kennedy, p. 63.

[2] *Ante*, Vol. 1, § 56.

[3] Simmons, pp. 437, 438, 443. And see Army Regulations, Art. 83; Lt. Dunkin's case, Simmons, p. 442; *Supra*, § 468, note.

[4] Captain Gibb's case, Simmons, p. 439.

limited within a particular period of time after the offence was committed.[1] The usual allegation as to time is "on or about" such a day; but where the offence is alleged to have been committed on a precisely specified day, and is proved to have been committed on another and different day, it is said to be in strictness the duty of the court to specify, in their finding, the precise day proved.[2]

§ 482. The rule, also, requiring *the best evidence of which the case, in its nature, is susceptible*, is the same in military law as at common law.[3] In the administration of this rule, a clear distinction is to be observed between the best possible evidence, and the strongest possible assurance. The rule merely requires the production of such evidence as is primary in its nature, and not secondary or substitutionary. Hence it demands the production of original documents, if they exist and can possibly be obtained, rather than copies or extracts. But it does not insist on an accumulation of testimony, where the fact is already proved by one credible witness. In cases of necessity, it admits the prosecutor as a competent witness. Thus, if an inferior officer is prosecuted by his superior, on a charge of insulting him *when alone*, by opprobrious and abusive language, the prosecutor is a competent and sufficient witness, to support the charge.[4]

§ 483. Courts martial also admit *exceptions* to this rule, similar to those admitted at common law. Thus, on the trial of an officer or soldier for disobedience of the orders of his superior, it is not, in general, necessary to produce the *commission* of the superior officer in order to prove his official character and rank; but evidence that he had publicly acted and been recognized and obeyed as an officer of the alleged grade, and that this was known to the accused, will be sufficient, *primâ facie*, to establish that fact. So, on a charge of desertion or other offence against military discipline, it will be sufficient to prove that the accused received the pay, or did the duties of a soldier, without other proof of his enlistment or oath. And where an officer is charged with a breach of the particular duty of his office, proof that he had acted in that character will be sufficient, without proving his commission or appointment.[5]

[1] See *ante*, Vol. 1, §§ 56, 61, 62.
[2] Simmons, pp. 444, 445, note.
[3] *Ante*, Vol. 1, § 82.
[4] Lt. Thackeray's case, 2 McArthur, 103, 104; Id. App. No. 17; Case of Paymaster Francis, Simmons, p. 450.
[5] Simmons, p. 454. And see *ante*, Vol. 1, § 92; Rex *v.* Gardner, 2 Camp. 513

§ 484. Illustrations might be added of the application of the common-law rules of *presumption*, and of the other rules which govern in the production of evidence; but these will suffice to show the bearing of the general doctrines of evidence upon the proceedings in courts martial.

### 2. ATTENDANCE OF WITNESSES.

§ 485. Respecting *the power of courts martial to procure the attendance of witnesses*, it is to be observed, that these courts, like all others which are intrusted with power definitively to hear and determine any matter, have inherent power, by the common law, to call for all adequate proofs of the matters in issue, and of course may compel the attendance of witnesses.[1] The summonses, both on the part of the prosecution, and on the part of the prisoner, are issued by the judge advocate, and are served by the provost marshal or his deputy, or by a non-commissioned officer appointed to that duty.[2] If the witness is an officer, he may be summoned by a letter of request from the judge advocate; and if he is a soldier, a letter is addressed to his commanding officer, requesting him to order the soldier's attendance. Persons not belonging to the army or navy, as the case may be, are summoned by a subpœna. If the court was called by an order, and all witnesses were therein required to attend, a failure on the part of a military witness, to attend, when summoned, it is said, would subject him to arrest and trial for disobedience of orders.[3] But irrespective of such express order to attend, it is conceived that a neglect to attend, without a sufficient cause, would subject a military person to arrest and trial for a breach of discipline,[4] and any person to attachment and punishment for a contempt of court.[5] The production of writings, in the possession of a party or a witness, is obtained in the same manner as in civil cases.[6]

§ 486. All witnesses in courts martial, and courts of inquiry, whether military or naval, must be sworn; but the manner of the oath may admit of some question. In the Navy Regulations it is

[1] *Ante*, Vol. 1, § 309.

[2] 2 McArthur, p. 17. Courts of inquiry have the same power to summon witnesses as courts martial have, and to examine them on oath. Army Regulations, Art. 91; Navy Regulations, U. S. Stat. 1800, ch. 33, § 2, Art. 1, Vol. 2, p. 51.

[3] Simmons, p. 192.

[4] Kennedy, p. 83.

[5] In the Navy Regulations, this power is expressly given; but it is an inherent power in every court, authorized to summon witnesses before it. See U. S. Stat. 1800, ch. 33, § 1, Art. 37; Id. § 2. Art. 1, Vol. 2, pp. 50, 51.

[6] *Ante*, Vol. 1, §§ 309, 558–564.

only required, in general terms, that "all testimony given to a general court martial shall be on oath or affirmation," without prescribing its form;[1] but in the Army Regulations,[2] though it is required that "all persons who give evidence before a court martial are to be examined on oath *or affirmation*," yet the article proceeds to add, — "in the following form," — "You swear, or affirm (as the case may be), the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God." The concluding part of this formula is that to which persons, who are conscientiously opposed to taking an oath most strenuously object; and the question has arisen, whether this form is imperatively required to be used in all cases, to the exclusion of that which is administered in the civil tribunals to persons conscientiously scrupulous of taking an oath. In a parallel case in the English service, it has been said that this form, without deviation, was to be observed in the examination of military witnesses, with reference to whom it was imperative; but that, with respect to persons not controllable by the article of war, the form might be varied, to meet their peculiar views of religious duty.[3]

### 3. COMPETENCY OF WITNESSES.

§ 487. The rules in regard to the *competency of witnesses* are the same in courts martial as in the courts of the common law. Hence, as we have seen,[4] the *prosecutor* is admissible as a witness; as also are the *members of the court*. But it is to be observed that the court cannot receive, in private, any communication in the nature of testimony from one of its members; neither ought his private knowledge of any fact, not testified by him as a witness, to influence his decision in the cause; but if he knows any fact material to the issue, he is bound to disclose it to the parties or to the court, that he may be called and sworn as a witness.[5] He is not thereby disqualified from resuming his seat as a member of the court; but where there is a sufficient number of members,

[1] U. S. Stat. 1800, ch. 33, § 1, Art. 37, Vol. 2, p. 50.

[2] Army Regulations, Art. 73.

[3] Simmons, p. 208. This author's own opinion, stated in a note, seems much more consistent with the general policy of the law, and with sound principles of construction; namely, that the article was merely intended to insure uniformity in the form adopted, when not at variance with the established religious principles of any sect to which the witness may profess to belong.

[4] *Supra*, § 482; 2 McArthur, 105, 106.

[5] Simmons, p. 466; 2 McArthur, p. 86; Maltby, p. 48; Adye, p. 57.

without him, to constitute the court, it is more in accordance with the usage in civil courts that he should withdraw.[1]

§ 488. Persons incompetent as witnesses at common law by reason of deficiency of understanding, insensibility to the obligations of an oath, direct pecuniary interest in the matter in controversy, infamy, or for other causes,[2] are for the same reasons incompetent to testify in courts martial. And the mode of proof of these disqualifications is in all courts the same. In regard to infamy arising from conviction and sentence by a court martial, the prisoner is never thereby disqualified until the sentence has been approved by the superior authority, where such approval is required; nor is he then disqualified, unless the crime itself is, in *legal* estimation, an infamous crime.[3] The crime of *desertion* is not an offence of this description; and of course a conviction for it does not render the party legally incompetent to testify, however it may affect the credibility of his testimony.[4]

§ 489. As to the competency of *fellow-prisoners*, as witnesses for each other, *where several are joined in the same prosecution*, though the general principle is the same in courts martial as it has, in a preceding volume,[5] been stated to be in suits at law; yet there is a diversity in its application, arising from a diversity in the constitution of the courts. It is clear that, in such cases, in the common-law courts, where against one or more of the prisoners there has been no evidence, or not sufficient evidence to warrant a conviction, a verdict and judgment of acquittal may immediately be rendered, at the request of the others, and the person acquitted may then be called as a witness for them. But the regular course for a prisoner to adopt in that case, in a court martial, would be, on the receipt of the copy of the charges, to apply to the authority that appointed the court, urging the necessity of a separate trial; and if this is not granted, an application to the court is still open to the prisoner; and the court may proceed to a sentence of acquittal of the party not proved to be guilty, and whose testimony is desired, and adjourn any further proceeding, until sufficient time is afforded for this sentence to be confirmed.[6] But no good reason is perceived against admitting the acquitted party as a wit-

[1] Simmons, p. 224.
[2] *Ante*, Vol. 1, §§ 327 – 430.
[3] *Ante*, Vol. 1, §§ 372 – 376.
[4] Simmons, p. 481.
[5] *Ante*, Vol. 1, §§ 357 – 359, 363.
[6] Simmons, p. 485; Muspratt's case, 2 McArthur, p. 158. And see Adye, p. 57.

ness for the others, immediately upon his acquittal by the court martial, without waiting for a confirmation of the sentence.

#### 4. EXAMINATION OF WITNESSES.

§ 490. Witnesses in courts martial are invariably *examined in open court*, in presence of the parties, except in those cases where depositions are by law admissible, when taken pursuant to the Regulations. It is not competent for the court to examine a witness by a deputation of some of its members for that purpose; though under peculiar circumstances, and in the inability of an important witness to attend at the place appointed for the court to assemble, the court, with the permission or by the order of the authority convening it, may assemble at the quarters or residence of the witness.[1]

§ 491. In the ordinary practice of the court, *the witnesses are examined apart from each other*, no witness being allowed to be present during the examination of another who is called before him. But this rule is not inflexible; it is, in modern practice, subject to the discretion of the court. Nor is it ever so rigidly observed as to exclude the testimony of a person who has inadvertently been present at the examination of other witnesses.[2] The judge advocate and the prosecutor being necessarily present during the whole trial, ought, if witnesses, to be sworn immediately after the case is opened on the part of the prosecution; nor is it deemed proper, at any subsequent stage of the proceedings, to examine them in chief, unless when they are called as witnesses for the prisoner.[3] The court, however, in proper cases, and in its discretion, will confront any two or more witnesses whose testimony is contradictory; by recalling them after the close of the cross-examinations, that opportunity may be afforded to explain and reconcile their respective statements, and to discover the truth of the fact.[4]

§ 492. All *evidence, orally given in courts martial, is taken down in writing* by the judge advocate, and *recorded* on the proceedings, in the words of the witness, as nearly as may be, and in the order in which it is received by the court. A question, being re-

[1] Simmons, pp. 461, 462; Adye, p. 115.
[2] 2 McArthur, p. 33; Maltby, p. 65; Simmons, p. 465; Kennedy, p. 85. And see *ante*, Vol. 1, § 432; O'Brien, p. 203.
[3] Simmons, pp. 464, 465; 2 McArthur, p. 105.
[4] Simmons, p. 468; Kennedy, p. 85.

duced to writing by the person propounding it, whether it be the prosecutor, the prisoner, or a member of the court, is handed to the president, and if approved by him, it is read aloud and entered by the judge advocate on the proceedings; after which, if no objection to it is sustained, it is addressed to the witness. If it is objected to by a single member only, of the court, the party propounding it is entitled to the collective opinion of the whole court as to its admissibility. And if the question is rejected by the court, the question and its rejection, are still entered of record with the proceedings. If a witness wishes at any time before the close of all the testimony to *correct* or *retract* any part of his evidence, in which he has been mistaken, he will be allowed to do so; but this must be done by an addition to what he has before stated, and *not by way of erasure or obliteration;* it being important, in all cases, that the superior authority, which reviews the evidence, should have an accurate, and, as it were, a dramatic view of all that transpired at the trial.[1]

§ 493. *Whether* a court martial has a *right*, of its own accord, *to call witnesses before it* who are not adduced by either of the parties, is a point which has frequently been agitated, and upon which opposite opinions have been held, the more modern being in the negative.[2] It is at least highly inexpedient, in ordinary cases, that the court should thus interfere with the course of the trial; since the necessity of it may always be avoided by suggesting the name of the witness to one or the other of the parties, whose interest might induce them to summons him. And in regard to questions directly propounded by the court, though its right to do so cannot be denied, yet the exercise of the right certainly does, in effect, prevent either party from objecting to the legal propriety of the question; for this has been prejudged by the member propounding it. If the question is perfectly clear of doubt, as to its admissibility, there can no mischief result from its being put by the court.

§ 494. *The order and course of the examination of witnesses* in courts martial, and of their cross-examination and re-examination, are the same, in general, as has been stated in trials at law.[3]

[1] Maltby, pp. 44, 65, 66; 2 McArthur, pp. 44, 45; Simmons, p. 472; O'Brien, p. 285; Kennedy, p. 105.

[2] See 2 McArthur, p. 107; Simmons, p. 467; O'Brien, p. 259; Kennedy, pp. 132–143.

[3] *Ante*, Vol. 1, §§ 431–469.

### 5. DEPOSITIONS.

§ 495. By the general principles of military law, *depositions are not admissible in evidence.* It is only in those cases of crime, where, by statutes, they are made admissible on the trial of indictments, that courts martial, in the English service, have admitted them.[1] But in the American service, it is specially ordered, that, "on the trial of cases not capital, before courts martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and the person accused are present at the taking the same, or are duly notified thereof."[2] This regulation, being a statutory exception to the general rule which excludes depositions, must be confined to the cases expressly mentioned, namely, to cases not capital, and to persons not in the line or staff of the army. In capital cases, and with respect to persons belonging to the line or staff, the admissibility of depositions is governed by the general rule.

§ 496. *Depositions*, when *taken pursuant to the above regulation*, it is conceived, ought to be taken in the manner and for the causes stated in the acts of Congress on that subject; which, as they have been sufficiently stated in a preceding volume,[3] it is not necessary here to repeat. It may, however, be added, that though a deposition has been informally taken, and therefore is not admissible under the statute, it may still be read as a solemn declaration of the witness to contradict or disparage the testimony he may have orally given in court. It was formerly held, that what a witness has been heard to state at another time, may be given in evidence to *confirm*, as well as to contradict, the testimony he has given in court;[4] but this is not now admitted, unless where the witness is charged with a design to misrepresent, arising from some recently acquired relation to the party or the cause; in which case his prior statements may become material, in order to disprove the charge, by showing that he had made the same statement before such relation existed.[5]

[1] 2 McArthur, p. 121; Simmons, p. 509.

[2] Army Regulations, Art. 74. And see Maltby, p. 65; O'Brien, p. 186.

[3] *Ante*, Vol. 1, §§ 322–324. See U. S. Stat. 1793, ch. 20, § 30, Vol. 1, p. 88; U. S. Stat. 1793, ch. 22, § 6, Vol. 1, p. 335; U. S. Stat. 1827, ch. 4, Vol. 4, p. 197.

[4] Hawk, P. C. b. 2, ch. 46, § 14; 2 McArthur, p. 120; Kennedy, p. 98; Cooke *v.* Curtis, 6 H. & J. 93.

[5] *Ante*, Vol. 1, § 469; Bull. N. P. 294; 2 Phil. Evid. 445, 446.

6. PUBLIC AND PRIVATE WRITINGS.

§ 497. The rules already stated in a former volume,[1] in regard to the inspection, proof, admissibility, and effect of public records and documents, and of private writings, as they are founded on general principles applicable alike to all judicial investigations, are recognized in all judicial tribunals, whether civil, military, or criminal; subject to a few exceptions and variations of administration, necessarily arising from their diversities of constitution and forms of proceeding. These it only remains for us briefly to illustrate, by a few military examples.

§ 498. In regard to *public military records*, it has been adjudged that the *report of a court of inquiry* is a privileged communication, and cannot be called for without the consent of the superior military authority which convened the court; nor can an office copy of it be admitted without such permission. It stands on the footing of other secrets of state, heretofore mentioned.[2] Therefore, where the commander-in-chief directed a military inquiry to be held, to investigate the conduct of an officer in the army, who afterwards sued the president of that court for a libel, alleged to be contained in his report, and to have been transmitted to the commander-in-chief; it was held, upon the broad principle of state policy and public convenience, that the report, being a matter of advice and information given in the course of public duty, and for the regulation of a public officer, could not be disclosed to the world at the pleasure of private persons, in a private suit, without permission from the superior authority; and that, therefore, in the case at bar, the evidence was properly rejected.[3] In the *English* service, the proceedings of a *court of inquiry* are held not admissible in a *court martial*, as evidence of the facts detailed in the testimony there recorded; and rightly; for those courts in England are not considered as judicial bodies, they have not power to administer oaths, nor any inherent power to summon witnesses; and the right of the accused party to appear or take any part in the proceedings is questioned; it being deemed rather a council than a court.[4] But in the *American* service, as we have seen,[5] courts of inquiry are established by law, and have a judicial

[1] *Ante*, Vol. 1, §§ 471 – 498, 557 – 582.
[2] *Ante*, Vol. 5, § 251.
[3] Home v. Ld. Bentinck, 2 Brod. & Bing. 130; Simmons, p. 471.
[4] Simmons, pp. 96, 98, 503; 1 McArthur, pp. 107 – 118; *Supra*, § 475.
[5] *Supra*, § 475.

character, with the same power with courts martial to summons and examine witnesses, and giving the accused the same right to cross-examine and interrogate them. Their proceedings, therefore, are expressly made admissible in evidence in courts martial in cases not capital, nor extending to the dismission of an officer; provided, that the circumstances are such, that oral testimony cannot be obtained.[1]

§ 499. The *records of courts martial*, being the records of judicial tribunals legally constituted, may be proved and admitted in evidence, and have effect, like all other judicial records. *General orders* and *regulations*, issued by the President of the United States, pursuant to law, or by the Secretary of War, or the Secretary of the Navy, within the scope of their authority, when duly promulgated, are presumed to be known to all military persons, and therefore will be taken notice of by courts martial; the printed copies being used merely to refresh the memory. The *Articles of War*, both for the land and naval service, being enacted by Congress, are judicially taken notice of by all persons, as other public statutes.[2]

§ 500. All writings and documents, whether public or private, which are admitted in evidence, are noticed in the proceedings of the court; and copies of them should be embodied in the proceedings in the order in which they are produced in evidence; or, if voluminous, extracts of so much as may bear on the question and is required by either party, may suffice. If their genuineness is admitted by the party against whom they are produced, the admission also should be recorded. If, instead of being thus embodied, copies of them are annexed to the proceedings as an appendix, they should be numbered, and lettered, and referred to in their proper place in the proceedings, and each copy should be authenticated by the signature of the judge advocate, or the president of the court.[3]

§ 501. Though *private letters* are not legal evidence of the facts stated in them, and therefore are not admissible in evidence for that purpose, and cannot be annexed to the proceedings of the court; yet the usage of courts martial allows an exception to this rule, in regard to letters in favor of the prisoner's character; by

[1] Army Regulations, Art. 92; U. S. Stat. 1800, ch. 33, § 2, art. 2; Vol. 1, p. 51.

[2] Simmons, pp. 500–502. And see *ante*, Vol. 1, §§ 471–509.

[3] Simmons, p. 508.

permitting him to embody them in his defence; whereby they become part of the proceedings, and thus are brought to the notice of the authority which revises the sentence, and receive their due weight and consideration.[1]

[1] Kennedy, pp. 119, 120; Colonel Quentin's Trial, p. 35.

# GENERAL INDEX.

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Cambridge: Stereotyped and Printed by Welch, Bigelow, & Co.

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